FILED

No. 96 1884 MAY 27 1997

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In The

Supreme Court of the United States

October Term, 1996

Robert Allen, Robert Bailor, John Clarke, Denise Coker, Earl Ennis, Lawrence Freeman, Monte Gaunt (deceased), Rick Grabenstein, William Grub, Cliff Harding, Donald Johnson, Stephen Keane, Kenneth Krogh, Michael Lavelle, Larry Lindskog, Jack Neumiller, Andrew Pavlischak, Gerald Poindexter, Richard Poole, Sheldon Reeve, Nicolis Stanley, Robert VanLeuven, Ralph Weir, Jr., and Michael Yates,

vs. *Petitioners,*

Gypsy Church of the Northwest, a voluntary association, by and through Grover Marks, Trustee; Grover and Marie Marks, husband and wife; Marguerite Marks; Marguerite Marks as Guardian ad Litem for Steven Marks; Robert and Polly Marks, husband and wife; Robert and Polly Marks as Guardians ad Litem for minor children: Richard Marks, Shirley Marks, Lisa Marks and Steve Marks; Larry and Laura Zeko, husband and wife; Larry and Laura Zeko as Guardians ad Litem for minor children: Robert Zeko, Jason Zeko, Crissie Zeko and Sonny Zeko; Pete Marks, a single man; Peter Marks as Guardian ad Litem of a minor: Buck Marks; James Senator Marks, II, and Jane Marks, husband and wife; Tommy Marks; David Marks; James Senator Marks, II, as guardian ad litem for minor children: Marie Marks, Michael Marks and Sonny Marks; Linda Marks; and Tina Marks,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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1250 PP

QUESTIONS PRESENTED

1. Did the Ninth Circuit err when it awarded attorneys' fees to plaintiffs-appellees under 42 U.S.C. § 1988 on an interlocutory appeal when the plaintiffs have not obtained an enforceable judgment, consent decree, or settlement, in direct conflict with *Farrar v. Hobby*?

2. Did the Ninth Circuit err when it failed to grant qualified immunity to law enforcement officers, and held them liable, for searches of individuals which were expressly authorized by a search warrant that had been reviewed by a prosecuting attorney and a judge prior to issuance under substantial time constraints and during exigent circumstances?

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PETITION FOR WRIT OF CERTIORARI

The officers respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 19, 1996, because the Ninth Circuit has decided two important federal questions in ways that conflict with relevant decisions of this Court, and in order to resolve the conflict between the Ninth and Fourth Circuit Courts of Appeals on the important issues presented herein.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit that gives rise to this petition is reported at 102 F.3d 1012 (9th Cir. 1996). It is reprinted in Appendix A hereto at App. 1. By order filed February 26, 1997, the Ninth Circuit amended its opinion, and denied the petition for rehearing. *See* App. 3.

JURISDICTION

On October 21, 1993, November 23, 1993, January 21, 1994, and March 7, 1994, the United States District Court for the Eastern District of Washington issued orders which denied qualified immunity to the law enforcement officers, and ultimately ruled that many of the officers were liable to various plaintiffs for violations of the Fourth Amendment. See Appendices B, C, D and E hereto.

The officers timely appealed each order to the Ninth Circuit, which affirmed in part and reversed in part, and remanded the cases to the district court in an opinion filed on December 19, 1996. On February 26, 1997 the Ninth Circuit denied the officers' timely-filed motion for rehearing, though it modified a portion of the recitation of the factual background in the opinion. Pursuant to Supreme Court Rule 13.3, this petition has been filed within 90 days of the denial of rehearing.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254.

STATUTES INVOLVED IN THIS CASE

42 U.S.C. § 1983 provides:

§ 1983. Civil action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress

applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1988 provides:

§ 1988. Proceedings in vindication of civil rights

. . .

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title,,[1] the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

[1]So in original.

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon

probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A. Introduction.

As the Ninth Circuit noted, the factual and procedural history of these two civil cases is extensive. The Ninth Circuit's recitation of that background is found at Appendix A, App. 5-34. The following summarizes the most relevant issues for this petition.

B. Course of proceedings.

On June 18, 1986 law enforcement officers in Spokane, Washington, conducted a search and seizure operation at two houses during an investigation into the plaintiffs' trafficking in stolen property. In June, 1989, the plaintiffs filed complaints for damages against two municipalities and 24 individuals, all of whom except two were law enforcement officers. The plaintiffs alleged violations of their First, Fourth, Fifth, Sixth, Ninth, and Fourteenth Amendment rights and they sought damages under 42 U.S.C. §§ 1981, 1982, 1983, 1985, 1986 and 1988. Each plaintiff seeks at least one million dollars in damages. The collective damages sought total $59 million. The defendants denied each of plaintiffs' claims. Each of the individual defendants asserted qualified immunity from suit as an affirmative defense.

During the course of pretrial motion practice basically all of the plaintiffs' causes of actions have been dismissed, with the exception of their claims under the Fourth Amendment.

The defendants moved for summary judgment of dismissal of all claims in 1990. The motions regarding the Fourth Amendment claims were denied on the basis that issues of material fact existed.

The parties entered private mediation in March, 1992, approximately one month prior to their trial date. The defendants had made offers of judgment under Fed. R. Civ. P. 68 prior to the mediation; the plaintiffs did not respond to the offers. The mediation did not result in a settlement, though the parties worked out an agreement for a "damages only" trial during which the plaintiffs would attempt to establish what damages, if any, each was entitled to, and plaintiffs' attorneys would have the right to seek attorneys' fees, if awarded by the court. The district court judge who had handled the cases to that point, the Honorable Robert J. McNichols, died during the course of the proceedings, and the settlement agreement was voided.

The Chief Judge for the Eastern District of Washington attempted to get the parties to settle the cases before he assigned them to a new judge for trial. The efforts were unsuccessful. The cases were then assigned to the Honorable Alan A. McDonald.

The parties again brought cross motions for summary judgment. On October 21, 1993 the district court denied, as a matter of law, each defendant's motion for dismissal based on qualified immunity (except for Detectives Reeve

and Grabenstein; the court deferred ruling on their motions). *See* Appendix B, App. 58. The court did not rule on the merits of the plaintiffs' motions against the individual defendants. The court ruled that plaintiffs had not properly moved for summary judgment against the individual defendants on the alleged constitutional violations; the court ordered the plaintiffs to revise their motions and to set them for hearing. All defendants, except Grabenstein, filed notices of appeal on November 10, 1993.

On November 23, 1993 the district court refused to stay its proceedings notwithstanding the individual officers' appeals which were pending in the Court of Appeals. *See* Appendix C, App. 91.

On January 21, 1994 the district court denied Detectives Reeve's and Grabenstein's motions for qualified immunity and partially granted the plaintiffs' motion for summary judgment of liability against individual defendants. The court preserved the remaining liability issues for trial. *See* Appendix D, App. 133. Defendants Reeve and Grabenstein timely filed motions for reconsideration of their qualified immunity motions, and the court denied those motions by order dated March 7, 1994. *See* Appendix E, App. 183.

The Court of Appeals then considered the appeals of the four orders. Prior to briefing, the Ninth Circuit ordered the parties to participate in its mediation program, and assigned a mediator. The mediation efforts did not resolve the cases, and they were removed from the mediation program, and the Ninth Circuit ultimately ruled on the appeals. *See* Appendix A. The plaintiffs have

never obtained an enforceable judgment, consent decree, or settlement with any defendant.

The plaintiffs' attorneys recently submitted motions for attorneys fees to the district court seeking more than $1.3 million as a lodestar figure.

C. Statement of Facts.

The facts regarding the qualified immunity motions of the defendant officers are wide-ranging and the record is extensive. The facts presented here are the most relevant facts for this petition. The facts demonstrate a professional, successful investigation into a significant stolen property ring operated at the two plaintiff houses in the City of Spokane, Washington. The officers were able to locate approximately 200 items of stolen property (mostly jewelry) and a cache of $1.6 million despite the plaintiffs' intentional efforts to disrupt the police during the two searches.

The investigation into the stolen property ring was initiated by Spokane County Sheriff Detective Rick Grabenstein in April, 1986. He caught several teenage burglars who confessed to 17 burglaries. One burglar agreed to become a "cooperating individual," and he identified the locations at which he sold all of the stolen property from the burglaries. Two of the locations are homes at which some of the plaintiffs lived, 428 South Thor and 802 South Thor in the city of Spokane, Washington. The third location was a nearby used car lot operated by the

families. The informant agreed to assist officers investigate the stolen property ring by attempting to sell purportedly stolen property to individuals at the three locations while under police surveillance.

All this while, the police were working with Deputy Prosecuting Attorney Patricia Thompson, who worked closely with the officers in a "Burglary Task Force." The sales involving the cooperating individual under surveillance took place in early June, 1986. The sales of purportedly stolen property (and negotiating sessions that did not result in sales) occurred in the presence of various members of the Marks family at the houses, including children.

On June 18, 1986 the informant attempted another sale while wearing a body wire for police. However, when the informant went to 802 S. Thor both he and police immediately realized that the investigation had been compromised. The officers left a surveillance officer at each house and returned to the police station to inform their supervisors of the developments.

The detectives discussed the developments with Lt. Freeman and the captain of the Investigative Division, Bob Allen. They determined that this phase of the investigation would have to be immediately concluded. They also determined that search warrants should be obtained and executed at the houses immediately because they feared the suspects were likely to dispose of or relocate the evidence. Officers from other units in the department were recruited to assist. The basic participants were assigned roles as follows: management of the overall operation; field supervision; designation of investigative

"case managers" for the searches at each house; planning for securing the houses and ensuring safety during the searches (they planned to search each house simultaneously); searchers to work for the case managers; security; and video-taping of the searches.

Three detectives, Grabenstein, Neumiller and Reeve, began preparation of the affidavit of probable cause in support of the warrants to search the two houses while the basic operational plan was formulated by the supervisors. The officers were under severe time constraints. Det. Reeve typed a list of the items that had been sold to the Markses during the undercover operation and incorporated it in the affidavit of probable cause. Based upon the burglar's confession and statement that virtually all of the property from his seventeen burglaries was sold at 802 and 428 S. Thor, the detectives also attached and incorporated the lists of stolen property that had been prepared by the burglary victims. The affidavit of probable cause was prepared for Det. Grabenstein's signature. Det. Neumiller left before the affidavit and warrants were complete. (*See* infra, p. 11.) When the affidavit and search warrants were complete, they were reviewed by Deputy Prosecuting Attorney Patricia Thompson. The main body of the affidavit was four single spaced typewritten pages containing numerous details about the burglaries, the investigation into the fencing operation, the interviews with burglars who identified the Markses at the two houses as fences, the fact that the sales of stolen property were made and discussed in front of family members at the two houses, the nature and description of the items sold, etc. The fifth page contained a list of purportedly stolen items sold by the informant to the Markses. The

6th page listed the detective's request for places and persons to be searched and items to be seized. It included:

> PERSON(S), Described as follows: James Marks, Grover Marks, and any other person on the premises at the time of warrant execution for officer safety.

Det. Grabenstein signed this page in Spokane County District Court Judge Raymond Tanksley's presence, who signed it as well. Judge Tanksley questioned the officers, then signed the search warrants.

The search warrant for S. 428 Thor said in pertinent part:

> . . . evidence of said felony is located:
>
> . . . on the following person(s):
>
> Any persons on the premises of S. 428 Thor, Spokane County, WA.

Neither the judge, nor the prosecutor, nor the detectives noticed any constitutional problem. The district court determined that the discrepancy between the affidavit and the warrants to search all persons was an error that was "not facially obvious," which "was likely overlooked by Grabenstein and Reeves as it was by the magistrate. It is almost certainly a clerical error rather than fraud by Grabenstein and Reeves." Appendix E, App. 194, and n. 9. It further noted that the magistrate "questioned Grabenstein and Reeve at length regarding the warrants," and determined that there is no evidence that the officers knew the warrants were invalid. Appendix E, App. 194-5, and n. 10.

While Grabenstein, Neumiller and Reeve worked on the warrants, the supervisors briefed those recruited for the search operation. Additionally, Det. Neumiller stopped working on the warrant and went to the briefing and described the property that the two search warrants would seek. Since the warrants were not yet signed (the warrants were signed at 3:10 p.m.) the officers were informed that the warrants would seek many items known to have been stolen in a string of residential burglaries, especially numerous items of jewelry. Electronic equipment and photographic equipment were also described. They were informed that Det. Neumiller would be the case manager at the 802 S. Thor residence and Det. Grabenstein at the 428 S. Thor residence, and that the case managers would have the warrants.

The officers were then dispatched to a "staging area" near the two houses to await the warrants. At approximately 2:00 p.m. the surveillance officers advised that a car was leaving each residence. The officers were concerned that evidence was being removed from the houses. The simultaneous departure of vehicles heightened the officers' concern that the houses needed to be secured until the warrants arrived to prevent any additional movement of evidence. Lt. VanLeuven telephoned Deputy Pros. Atty. Patricia Thompson from the staging area; Deputy Prosecutor Thompson informed him that they could either seek consent to enter the houses and wait for the warrants, or they could secure the premises from the outside to prevent any ingress or egress. The officers decided to request consent.

At 428 S. Thor the home owner, Mrs. Lippie Marie Marks, allowed Lt. VanLeuven and the other officers to

enter the house where they waited for the warrant. The officers did not search anyone or anything before the warrant arrived, although they did make a "protective sweep" to ensure their safety and to be certain no potential evidence would be disturbed pending arrival of the warrant. (The plaintiffs allege the officers forcibly entered and searched hours before the warrant arrived.)

Several Marks family members were at the 428 S. Thor address when the warrant was delivered and the search began. Some of the people at that location were searched. A female detective, Denise Coker, was dispatched to 428 S. Thor to pat-down search some women and children. She conducted the pat-down searches in a bedroom while the others were in the living room, and gathered and recorded items of jewelry for review and possible seizure. No weapons were found. No one was handcuffed.

The officers allowed additional family members into the 428 S. Thor house at the request of Lippie Marie Marks even though they did not live there. The officers thought it would be less troublesome to allow Lippie Marie and her husband, Grover, to have family support while the police were present. Police allowed Ken Pete Marks and Bobby Marks to enter. They were pat searched by Det. Krogh.

The Markses were disruptive and/or created diversions during the search at 428 S. Thor. At times they attempted to "palm" or hide items that were being reviewed for possible seizure by the officers. Before the search was completed the officers determined that the

Markses were engaging in coordinated, extremely disruptive behavior and intentionally creating diversions. The officers consulted Lt. Freeman via telephone at the police station to discuss their options. At the direction of Capt. Allen, the officers collected the types of property identified in the warrant and moved the scene of the search to the Public Safety Building so that they could continue their efforts to execute the warrant and identify stolen property without further interference.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S OPINION DIRECTLY CONFLICTS WITH THE SUPREME COURT'S RULING IN *FARRAR v. HOBBY* AND THE FOURTH CIRCUIT'S HOLDING IN *S1 AND S2 v. STATE BOARD OF EDUCATION.*

A. The decision conflicts with *Farrar v. Hobby*.

The Ninth Circuit granted attorney's fees on an interlocutory appeal contrary to the express holding in *Farrar v. Hobby*, 506 U.S. 103 (1992). The plaintiffs seek $59 million in damages; they have been awarded $0.00. Their attorneys seek $1.3 million in fees.

Whether a party is entitled to an award under 42 U.S.C. § 1988 is determined by a two-prong test. The Ninth Circuit completely ignored the second prong. First, the party must establish he is the "prevailing party." Second, the "prevailing party" must establish a "level of success" in comparison to the actual relief sought. *Farrar v. Hobby, supra*. The plaintiffs seek millions of dollars in

damages, but have not yet obtained any relief establishing any actual damages. Section 1983 cases are no different than other damages cases; no damages may be awarded without proof of actual injury. *Carey v. Piphus*, 435 U.S. 247, 264 (1978). Therefore, awarding attorneys' fees at this time is premature.

> Where the relief sought and obtained is limited to money, the terms "extent of success" and "level of success" are euphemistic ways of referring to money.

McGinnis v. Kentucky Fried Chicken of California, 51 F.3d 805, 809-810 (9th Cir. 1994).

The Ninth Circuit determined that attorneys' fees are to be awarded to certain plaintiffs on certain limited issues. It stated:

> Plaintiffs here have won more than the mere right to proceed to trial. We affirm the district court's liability decision regarding those officers who searched persons, and certain plaintiffs have, accordingly, conclusively established their entitlement to relief. We have also made other determinations that will require decisions in plaintiffs' favor. We therefore hold that attorneys fees are appropriate in those instances. We remand the question of the amount of fees to the district court.

Appendix A at App. 55.

However, the cases cited by the Ninth Circuit at Appendix A, App. 55 in support of the award were decided *before Farrar v. Hobby, supra*, which substantially changed the criteria a party must meet in order to be entitled to attorneys' fees under 42 U.S.C. § 1988. The

Supreme Court determined that "the most critical factor" in determining the reasonableness of a fee award to a "prevailing party" is "the degree of success obtained." *Farrar, supra*, 506 U.S. at 114. None of the plaintiffs have an enforceable judgment, consent decree, or settlement against any defendant. Indeed, virtually all of their causes of action have been dismissed. Since this litigation is at a point where it is not possible to determine the "degree of success obtained," if any, by the plaintiffs, it is premature to order any fees at this time. At best, certain plaintiffs may only be deemed "prevailing parties."

> In some circumstances, even a plaintiff who formally "prevails" under § 1988 should receive no attorney's fees at all. A plaintiff who seeks compensatory damages but receives no more than nominal damages is often such a prevailing party. As we have held, a nominal damages award does render a plaintiff a prevailing party by allowing him to vindicate his "absolute" right to procedural due process through enforcement of a judgment against the defendant. *Carey*, 435 U.S., at 266. In a civil rights suit for damages, however, the awarding of nominal damages also highlights the plaintiff's failure to prove actual, compensable injury. *Id.*, at 254-264. Whatever the constitutional basis for substantive liability, damages awarded in a § 1983 action "must always be designed 'to *compensate injuries* caused by the [constitutional] deprivation.'" *Memphis Community School Dist. v. Stachura*, 477 U.S., at 309 (quoting *Carey, supra*, at 265) (emphasis and brackets in original). When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, see *Carey*,

> *supra*, at 256-257, 264, the only reasonable fee is usually no fee at all. In an apparent failure to heed our admonition that fee awards under § 1988 were never intended to "'produce windfalls to attorneys,'" *Riverside v. Rivera, supra*, at 580 (plurality opinion) (quoting S. Rep. No. 94-1011, p. 6 (1976)), the District Court awarded $280,000 in attorney's fees without "consider[ing] the relationship between the extent of success and the amount of the fee award." *Hensley, supra*, at 438.

Farrar, supra, 506 U.S. at 115.

It is quite possible that the appropriate attorney fee award in this case to the prevailing plaintiffs will be no fee at all. *Id.* The plaintiffs have consistently alleged and testified throughout the pre-trial proceedings that they were not only searched for jewelry, (which is the only issue on which the Ninth Circuit ruled that some plaintiffs prevailed) but that they were sexually molested, paraded naked in front of other people, beaten, prevented from using bathroom facilities and forced to urinate on themselves, and subjected to other similar outlandish and horrific indignities during the search. No objective evidence remotely supports these incredible claims. The defendants deny these allegations and are prepared to refute each and every one at trial. As in *Farrar, supra*, and numerous other civil rights cases, the plaintiffs who are seeking 59 million dollars may prevail on a technical constitutional issue, but receive a damages award that bears no relation whatsoever to the extraordinary sums sought.

There are several other factors throughout the long history of this case which are also quite likely to prevent

any prevailing plaintiff from obtaining "success" as measured by damages. The defendants should have the opportunity to present each and every argument with respect to the propriety of awarding *any* attorneys' fees at the appropriate time in the case, i.e., *after* the District Court has entered judgment establishing damages, which would be *after* a trial to determine if any plaintiff can prove damages on his/her prevailing issue. (This is assuming the plaintiffs prevail on this petition with respect to the second issue presented, i.e., whether any of the petitioners are liable.)

By ignoring the *Farrar* criteria, the Ninth Circuit has ordered the award of attorneys fees at a time when all it can conclusively do is determine that the plaintiffs are a "prevailing party." There is nothing for the district court, on remand, to compare to the plaintiffs' asserted "success."

What is the remedy if, after trial, plaintiffs only get nominal damages, or very low damages that are nowhere near the millions they seek? Will the court order the plaintiffs' attorneys to return any fees prematurely ordered at the interlocutory stage if they are unsuccessful at trial in obtaining the huge financial damages the plaintiffs seek? Is it appropriate to award fees on appeal if plaintiffs have not responded to Fed. R. Civ. P. 68 offers of judgment that were made several years before any rulings on summary judgment and the appeals to the Ninth Circuit? The Ninth Circuit's failure to adhere to *Farrar, supra,* has created confusion and injustice; its decision should be reviewed by this Court.

B. The Ninth Circuit's decision conflicts with the Fourth Circuit's holding in *S1 & S2 v. State Board of Education*.

In addition, the Ninth Circuit's decision conflicts with the Fourth Circuit's holding in *S1 & S2 v. St. Bd. of Educ. of N.C.*, 21 F.3d 49 (4th Cir. 1994)(en banc), *cert. denied*, ___ U.S. ___, 115 S.Ct. 205, 130 L.Ed.2d 135 (1994). In discussing the "catalyst theory," the Fourth Circuit adhered to the holding in *Farrar v. Hobby*, *supra*, stating:

> A person may not be a "prevailing party" plaintiff under 42 U.S.C. § 1988 except by virtue of having obtained an enforceable judgment, consent decree, or settlement, giving some of the legal relief sought in a § 1983 action.

S1 & S2, *supra*, 21 F.3d at 51.

The Fourth Circuit en banc decision adopted the dissenting opinion of Circuit Judge Wilkinson in the original *S1 & S2* decision. 21 F.3d at 41. Judge Wilkinson's decision (at 6 F.3d 168-72) and the Fourth Circuit's adoption of it declare that *Farrar* unequivocally held that:

> No material alteration of the legal relationship between the parties occurs *until* the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant. (Footnote omitted; emphasis in original.)

S1 & S2, *supra*, 6 F.3d at 168. The Fourth Circuit declared that this and other express statements in *Farrar* would be "rendered meaningless" if plaintiffs are awarded attorneys fees without demonstrated legal entitlement. *S1 & S2*, *supra*, 6 F.3d at 168. The Fourth Circuit delineated the conflict between itself and the other circuits, stating:

> The cases from other circuits cited by the majority [minority after en banc decision at 21 F.3d 49] are no more persuasive in resuscitating catalyst theory. With all due respect, those cases fail to come to grips with *Farrar's* ruling that "[n]o material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant." (Citation omitted.)

S1 & S2, supra, 6 F.3d 160 at 169, n 2.

Thus, the Ninth Circuit's opinion, which ignored and abandoned *Farrar, supra*, is also in clear conflict with the Fourth Circuit.

II. THE NINTH CIRCUIT'S DENIAL OF QUALIFIED IMMUNITY TO THE OFFICERS, COUPLED WITH THE DETERMINATION OF LIABILITY, IMPOSES A STANDARD OF STRICT LIABILITY ON LAW ENFORCEMENT OFFICERS. THE DECISION IS CONTRARY TO THIS COURT'S POLICY REGARDING QUALIFIED IMMUNITY, AND BURDENS ALL LAW ENFORCEMENT WITH UNWORKABLE GUIDELINES FOR ENFORCING COURT ORDERS.

The Ninth Circuit's denial of qualified immunity and determination of liability is contrary to the holdings and policy in *Anderson v. Creighton*, 483 U.S. 635 (1987), *Malley v. Briggs*, 475 U.S. 335 (1986), and *Hunter v. Bryant*, 502 U.S. 224 (1991).

The Ninth Circuit denied qualified immunity to each officer that searched persons at Appendix A, App. 31, stating:

> Instead we conclude that *regardless of the terms of the warrant*, the law was clearly established that the officers could not search all persons present on the premises in the absence of individualized probable cause. (Footnote omitted; emphasis added.)

The standard applied by the Ninth Circuit to any officer who allegedly searched a person is a rigid, unyielding standard. In effect, it applies a standard of strict liability to every officer any time *Ybarra v. Illinois*, 444 U.S. 85 (1979), is subsequently deemed to have been violated when the officer enforces a facially valid warrant that contains a mistake, even though it had been prepared and reviewed by an experienced detective and prosecutor, and was reviewed and signed by a judge. The Ninth Circuit's standard improperly requires each searching officer to evaluate *de novo* all action taken and all information known by others before he/she searches pursuant to the warrant. It must be kept in mind that the issue in the case is not whether evidence obtained in violation of *Ybarra, supra*, should be suppressed; the issue is one of qualified immunity from suit.

The Ninth Circuit's decision creates an unworkable burden for law enforcement agencies and officers throughout the country. Officers must rely upon direction from judges and supervisors during search operations. A search warrant is an order from a court which directs searching officers to take certain action; it is a statement to the officer in the field that probable cause exists for the officer to take the action ordered by the court. It is wholly inappropriate to ask line officers to second guess the probable cause determination made by a judge, especially

when the line officer is already aware that a prosecutor and experienced detectives have prepared the affidavit of probable cause and warrants. Public policy dictates that once a warrant has been issued by the magistrate, the officer in the field should enforce the warrant rather than ignore it. Officers in the field are acting as functionaries of the court when searching pursuant to a warrant; they should not have to be concerned about their personal liability in the event the warrant is ultimately deemed invalid.

> State officials "must not be required to act as pseudo-appellate courts scrutinizing the orders of judges," but subjecting them to liability for executing an order because the order did not measure up to statutory standards would have just that effect. To allow plaintiffs to bring suit any time a state agent executes a judicial order which does not fulfill every legal requirement would make the agent "a 'lightning rod for harassing litigation aimed at judicial orders.' " Simple fairness requires that state officers "not be called upon to answer for the legality of decisions which they are powerless to control." (Citations omitted.)
>
> A narrow conception of facial validity also would deprive the court of most of the benefit it derives from the existence of quasi-judicial immunity for officers carrying out its orders. " 'The fearless and unhesitating execution of court orders is essential if the court's authority and ability to function are to remain uncompromised,' " but state officers subject to litigation "might neglect the execution" of those orders. . . . "The public interest demands strict

> adherence to judicial decrees," . . . . (Citations omitted.)

Turney v. O'Toole, 898 F.2d 1470, 1473 (10th Cir. 1990).

The Ninth Circuit's decision affects four classes of officers in this case: the officers who prepared the warrants (Grabenstein & Reeve); the officers who ordered or authorized warrants to be sought (Allen and Freeman); any officers who directed others to comply with the warrants; and officers who searched persons (Grabenstein, Krogh and Coker).

In this case, Officers Krogh and Coker were mere functionaries at the time they were directed by the warrant to search certain individuals who could easily be hiding and/or wearing stolen property (jewelry) at the time; they were dealing with people who demanded to be present during the search and appeared to be implicated in hiding the stolen goods and/or creating diversions. Under the totality of the circumstances confronting each it is contrary to public policy to hold them personally liable for an error that occurred in a judge's chambers and was not caught by any of four people reviewing it. Attorneys and judges have had many hours since the searches occurred to study and pick apart the legal issues; officers at the scene did not. Indeed, the different conclusions on these issues reached by the prosecutor, defense attorneys and judges in the criminal case, followed by the conflicting decisions in the civil case underscore the difficulties faced by the officers in the heat of the moment.

Even if this Court determines that the officers who prepared and sought the search warrant did so unconstitutionally as it relates to the search of the individual plaintiffs at the two respective homes, the officers are nonetheless entitled to qualified immunity from suit under this Court's case law. As stated in *Anderson v. Creighton*, 483 U.S. 635 (1987),

> We have recognized that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials – like other officials who act in ways they reasonably believe to be lawful – should not be held personally liable.
>
> . . .
>
> We have frequently observed, and our many cases on the point amply demonstrate, the difficulty of determining whether particular searches or seizures comport with the Fourth Amendment. (Cite omitted.) Law enforcement officers whose judgments in making these difficult determinations are objectively legally reasonable should no more be held personally liable in damages than should officials making analogous determinations in other areas of law.

Id., 483 U.S. at 641, and 644.

Qualified immunity is extended to officers who were alleged to have violated the Fourth Amendment. *See*: *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Malley v. Briggs*, 475 U.S. 335 (1986); *Anderson v. Creighton, supra*. However, even if the clear standard in *Ybarra, supra*, had been violated in this case it is nonetheless appropriate to grant qualified immunity to the two officers (Coker and Krogh)

who conducted a search of some people at 428 S. Thor because, based upon the totality of the circumstances confronting each of them, a reasonable officer *in his/her situation* could believe that his or her actions were, in fact, lawful. *Hunter v. Bryant*, 502 U.S. 224, 228-9 (1991). The officer's interpretation need not be the *most* reasonable; the correct inquiry is whether a reasonable officer *could* believe his conduct to be lawful. *Id.* Even "if officers of reasonable competence could disagree on this issue, immunity should be recognized." *Malley v. Briggs*, 475 U.S. at 341. The Ninth Circuit's denial of qualified immunity and imposition of liability upon the officers with the *least* amount of information should be reviewed.

Similarly, the Ninth Circuit's determination (*see* Appendix A, App. 30) that any officer or supervisor who helped obtain the warrants could be liable is contrary to this Court's qualified immunity decisions. If this petition is denied, this Court will allow the Ninth Circuit's decision to bind law enforcement officers in hectic, confusing, and even dangerous situations for inadvertent mistakes made by others, including judges. The record does not contain any evidence that suggests any officer or supervisor directed others to get a warrant to search "all people present," contrary to *Ybarra, supra*. Qualified immunity should be granted rather than directing the district court to seek out tortfeasors when pretrial discovery and motion practice has established no facts to support liability.

Finally, the Ninth Circuit's decision to hold liable the officers who obtained the warrants (Dets. Reeve and Grabenstein) is contrary to this Court's qualified immunity policy declarations. *Malley v. Briggs, supra; Anderson v.*

Creighton, supra. The district court determined that the authorization in the warrants to search all persons was an error that was "not facially obvious," which "was likely overlooked by Grabenstein and Reeves as it was by the magistrate. It is almost certainly a clerical error rather than fraud by Grabenstein and Reeves." Appendix E, App. 194, note 9. The district court noted that plaintiffs' allegations that Reeve and Grabenstein knew the warrants were invalid "appear unfounded," there being no evidence whatsoever produced by plaintiffs. Appendix E, App. 194-5, note 10. They even had an experienced prosecutor scrutinize it prior to submission to the judge.

The Ninth Circuit also overlooked or misapprehended the record on a critical issue regarding Dets. Grabenstein and Neumiller. The Court indicated in footnote 26 at Appendix A, App. 31, that it did not consider qualified immunity of an officer who searched only those persons specifically named in the warrant, the affidavit in support thereof, or "any others as to whom the affidavit established probable cause. No appellant asserts that his conduct was so limited." The Court either overlooked or misapprehended the record and argument in support of Detective Grabenstein's motion for qualified immunity.

Detective Grabenstein's involvement in the search was discussed at pages 49-53 of the "Appellants' Consolidated Brief." At page 50 (App. 209) it was argued:

> Detective Grabenstein did not search beyond that scope of the warrant. *He searched only Grover Marks, whom he knew to be personally named in the warrant*. (ER 224) He personally seized only two gold rings and a watch from Grover Marks. (ER 244) Detective Grabenstein

> knew those items matched "multiple" descriptions in the search warrant. (ER 1494, n. 37) (Emphasis added.)

Similarly, at page 51 (App. 211) he argued:

> The search warrant authorized the search of Grover Marks. Detective Grabenstein *knew* the warrant contained "multiple" men's rings and gold watches. As stated in the affidavit *he had just prepared*, Grabenstein had information that Grover Marks had been buying just such property, and that White's purchasers had been seen wearing some of the stolen property. (ER 603-04) Grabenstein is entitled to qualified immunity for his limited search and seizure from Grover Marks. (Emphasis in original.)

This issue was also addressed in the "Appellants' Consolidated Reply Brief" at pages 15-16.

Detective Grabenstein should be granted qualified immunity for his search of Grover Marks because the record is uncontested that he searched only Grover Marks, a person for whom probable cause was established in the affidavit.

The Ninth Circuit erroneously determined that Det. Neumiller unreasonably obtained and executed a warrant to search all persons present. Appendix A, App. 30-31. It noted that he "assisted" Grabenstein and Reeve in preparing the warrant application but went to one of the houses "before the warrant was authorized by the magistrate." App. 30, and note 24. The Ninth Circuit overstated his involvement. It is uncontradicted that his involvement was limited as he testified by affidavit at ER 268:

> My assistance in the preparation of the warrant was limited to gathering various reports about the prior activities and burglaries and reviewing the basic facts for establishing probable cause with Det. Grabenstein and Det. Reeve. They then undertook the task of physically preparing the affidavit of probable cause and the warrant itself. They brought it to Spokane County Deputy Prosecuting Attorney Patricia Thompson for review, and then to Judge Tanksley for judicial review and authorization. (See App. 218-19)

He did not search anyone or direct anyone to search people. The denial of qualified immunity to him and determination he is liable should be reviewed.

CONCLUSION

The Court should accept review of the Ninth Circuit decision for several reasons.

The award of attorneys' fees under 42 U.S.C. § 1988 when the plaintiffs have not obtained an enforceable judgment, consent decree, or settlement is in direct conflict with *Farrar v. Hobby, supra,* and the Fourth Circuit's case law. It creates significant practical problems and is contrary to public policy.

The denial of qualified immunity to the law enforcement officers and determination of liability establishes dangerous and unworkable precedent for law enforcement, and is contrary to this court's holdings and policy

statements in *Anderson v. Creighton, supra, Malley v. Briggs, supra,* and *Hunter v. Bryant, supra.*

Dated this 23rd day of May, 1997.

JAMES C. SLOANE
City Attorney

ROCCO N. TREPPIEDI
Senior Assistant City Attorney

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APPENDIX A

James Senator MARKS; Tommy Marks;
David Marks, Plaintiffs-Appellees,

v.

John R. CLARKE; William F. Grub;
Stephen W. Keane; Michael Lavelle;
Gerald R. Poindexter; Robert VanLeuven;
Ralph C. Weir, Defendants-Appellants,

James Senator MARKS; Tommy Marks;
David Marks, Gypsy Church of the
Northwest, Plaintiffs-Appellees,

v.

John R. CLARKE; William F. Grub;
Stephen W. Keane; Michael Lavelle;
Gerald R. Poindexter; Robert VanLeuven;
Ralph C. Weir, Defendants,

and

Robert G. Bailor; Denise E. Coker;
Monte E. Gaunt; Donald E. Johnson;
Richard J. Poole; Nicolis E. Stanley;
Michael F. Yates, Defendants-Appellants.

James Senator MARKS; Tommy Marks;
David Marks, Plaintiffs-Appellees,

v.

John R. CLARKE; William F. Grub;
Stephen W. Keane; Michael Lavelle;
Gerald R. Poindexter; Robert VanLeuven;
Ralph C. Weir, Defendants,

and

City of Spokane; Robert Allen;
Earl L. Ennis; Lawrence R. Freeman;
Clifford Harding; Kenneth R. Krogh;

Larry M. Lindskog; Jack E. Neumiller;
Andrew J. Pavlischak; Sheldon Reeve,
Defendants-Appellants.

GYPSY CHURCH OF THE
NORTHWEST, Plaintiff-Appellee,

v.

SPOKANE COUNTY, Defendant,

and

John R. Clarke; William F. Grub;
Stephen W. Keane; Michael Lavelle;
Gerald R. Poindexter; Robert VanLeuven;
Ralph C. Weir, Defendants-Appellants.

GYPSY CHURCH OF THE
NORTHWEST, Plaintiff-Appellee,

v.

SPOKANE COUNTY, Defendant,

and

Robert G. Bailor; Denise E. Coker;
Monte E. Gaunt; Donald E. Johnson;
Richard J. Poole; Nicolis E. Stanley;
Michael F. Yates, Defendants-Appellants.

GYPSY CHURCH OF THE
NORTHWEST, Plaintiff-Appellee,

v.

SPOKANE COUNTY, Defendant,

and

City of Spokane; Robert Allen;
Earl L. Ennis; Lawrence R. Freeman;
Clifford Harding; Kenneth R. Krogh;

Larry M. Lindskog; Jack E. Neumiller; Andrew J. Pavlischak; Sheldon Reeve, Defendants-Appellants.

GYPSY CHURCH OF THE NORTHWEST, Plaintiff-Appellee,

and

Grover Marks, Plaintiff-Appellee,

v.

Detective Rick GRABENSTEIN, Defendant-Appellant.

Nos. 93-36092 to 93-36094, 94-35251 to 94-35253 and 94-35372.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Oct. 16, 1995.

Decided Dec. 19, 1996.

As Amended on Denial of Rehearing Feb. 26, 1997.

Church group and 26 individual complainants brought action against 23 police officers under § 1983 for allegedly violating their Fourth Amendment rights by unreasonably seeking and executing warrant to search two residences and all persons present at those residences. The United States District Court for the Eastern District of Washington, Alan A. McDonald, J., granted partial summary judgment for plaintiffs on issue of liability, and defendants appealed. The Court of Appeals, Reinhardt, Circuit Judge, held that: (1) officers who unreasonably obtained and executed warrant to search all persons present at family residences were not entitled to

qualified immunity; (2) material issue of fact on whether search began before or after warrant arrived precluded summary judgment for officers on qualified immunity grounds; (3) police officers who conducted traffic stops based on probable cause outside residence to be searched were entitled to qualified immunity; (4) approval of general "any persons on the premises" searches by prosecutor and magistrate who signed warrant did not entitle officers who obtained warrant to qualified immunity; (5) officers who were informed by their supervisors regarding scope of warrant fulfilled their duty to become informed as to scope of warrant, or to read or refer to signed warrant while they searched; (6) officers were entitled to qualified immunity for their conduct related to off-site inspection at police station of seized property; and (7) attorney fees were appropriate for actions against officers who searched persons other than suspects at family residences.

Affirmed in part; reversed and remanded in part.

Rocco N. Treppiedi and Jeanie J. Mohler, Assistant City Attorneys, Spokane, WA, Jerry R. Neal and John R. Nelson, Preston Gates & Ellis, Spokane, WA, for defendants-appellants.

Gregg R. Smith, Spokane, WA, Terry E. Thomson, Sternberg, Thomson & Okrent, Seattle, WA, and Patrick K. Stiley, Spokane, WA, for plaintiffs-appellees.

Appeals from the United States District Court for the Eastern District of Washington, Alan A. McDonald, District Judge, Presiding. D.C. Nos. CV-89-00423-AAM, CV-89-00425-AAM.

Before: REINHARDT, TROTT and TASHIMA*, Circuit Judges.

REINHARDT, Circuit Judge:

Appellants in this case are twenty-three individual City of Spokane police officers[1] and one individual Spokane County law enforcement officer.[2] Appellees, the plaintiff Gypsy Church of the Northwest and the twenty-six individual plaintiffs in district court cases *Marks v. City of Spokane* and *Gypsy Church v. Spokane County*, filed suit under 42 U.S.C. § 1983 in June 1989 alleging that three years earlier, in 1986, appellants and the City of Spokane and Spokane County (the "municipalities")[3] violated their Fourth Amendment rights by unreasonably seeking and unreasonably executing a warrant to search

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* The Honorable A. Wallace Tashima was a United States District Judge for the Central District of California, sitting by designation, when this case was argued. He has since been appointed to this court.

[1] We refer to the individual defendants as officers for convenience. However, one of the City defendants, video technician Michael Lavelle, is an employee of the Spokane City Police Department and not a police officer.

[2] The County defendant is Detective Rick Grabenstein. Another county law enforcement officer, Sheriff Larry Erickson is a defendant in this litigation. He is not a party to this interlocutory appeal, however.

[3] Unless otherwise qualified, the term "defendants" will refer to appellants and the municipalities collectively.

two residences and all the persons present at those residences. On this appeal, appellants challenge four orders of the district court in which that court initially denied all but two of the appellants qualified immunity, certified the interlocutory appeal of its qualified immunity determination as "frivolous" and retained jurisdiction over the proceedings, denied the remaining two appellants qualified immunity and granted partial summary judgment in favor of the plaintiffs. At that point it deemed the qualified immunity appeals no longer frivolous.

Appellants filed their first motions for summary judgment on the basis of qualified immunity in early 1990. District Judge Robert J. McNichols denied the motions on May 30, 1990 because material disputes of fact existed regarding their conduct during the search. In September 1991, Judge McNichols held that the issue whether the search was legal had been fully litigated and resolved, in state criminal proceedings, against both the individual officers and the municipalities and that they were all collaterally estopped from relitigating the search's legality in the present civil action. Later in September 1991, defendants requested the district court to reconsider its order regarding the applicability of collateral estoppel, and Judge McNichols denied the motion. In February 1992, plaintiffs moved for summary judgment, and defendants, in turn, again moved for reconsideration of the collateral estoppel issue. In a March 1992 order, Judge McNichols denied the plaintiffs' motion for summary judgment on the ground that "key issues of vigorously disputed fact" existed and again declined to

reconsider its collateral estoppel order.[4] The disputed issues of fact apparently related to questions of which of the individual officers did which acts to which plaintiffs and at what times.

Judge McNichols died before any further significant court proceedings occurred, and the case was reassigned to District Judge Alan A. McDonald. Defendants thereupon moved a third time for reconsideration of Judge McNichols' collateral estoppel determination, and the plaintiffs moved for reconsideration of the denial of their summary judgment motion. On October 21, 1993, Judge McDonald reversed Judge McNichols' collateral estoppel order as it applied to appellants[5] and, because appellants were no longer estopped from arguing that the search was lawful, granted the plaintiffs leave to revise and resubmit their summary judgment motion regarding the liability of the individual officers. In the same order, Judge McDonald denied qualified immunity to all of the

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[4] In October 1989, the defendants filed counterclaims against the Marks plaintiffs, alleging that some of the plaintiffs had violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO"). The district court dismissed defendants' RICO counterclaims in September 1991. In June 1993, the district court dismissed a separate action, originally filed in state court, in which the plaintiffs alleged that the defendants' RICO counterclaims violated their civil rights and that, by filing the counterclaims, defendants committed the torts of malicious prosecution, abuse of process, outrage, and negligent infliction of emotional distress.

[5] Judge McDonald agreed with Judge McNichols, however, that the municipal defendants, the City of Spokane and Spokane County, were estopped from relitigating the issue of the legality of the search.

individual City officers except Reeve and postponed ruling on the qualified immunity of Reeve and County officer Grabenstein until he ruled on the renewed motion for summary judgment that he expected the plaintiffs to file.[6] The individual City appellants, including Reeve, filed notices of appeal from this order. Reeve appealed the court's failure to rule on his qualified immunity motion,[7] while the other City officers appealed the court's denial of their qualified immunity motions on the merits. Grabenstein did not appeal the October 21, 1993 order until later.

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[6] In this order, the district court also reconsidered the defendants' motion for summary judgment as to certain claims on the grounds that: (1) the plaintiffs' alleged injury was not caused by a custom, policy, or practice of the County or the City and (2) there was no evidence that the defendants' actions were motivated by racial animus. It declined to grant summary judgment on the issue of municipal liability, holding that, viewing the evidence in the light most favorable to the nonmoving party, "a reasonable jury could find proof of customs, policies, or practices that would lead to municipal liability." Judge McDonald did, however, grant summary judgment in favor of the defendants on the claims alleging racial animus, concluding that the plaintiffs set forth no facts that would support a finding that the defendants acted with discriminatory intent. These portions of the October 21, 1993 order are not before us.

[7] We need not consider whether we have jurisdiction over Reeve's appeal from an order postponing a decision on qualified immunity, *see, e.g., Workman v. Jordan*, 958 F.2d 332, 335 (10th Cir.1992) (holding that orders postponing a decision on qualified immunity are immediately appealable), because his subsequent appeal of the district court's denial of qualified immunity for some of his conduct rendered his first appeal moot.

After filing their notice of appeal from Judge McDonald's qualified immunity order, the City appellants filed a motion in the district court to stay the trial set for March 7, 1994 and all other proceedings in the case pending resolution of their interlocutory appeal of the qualified immunity determination. On November 24, 1993, the district court certified their interlocutory appeal as "frivolous," retained jurisdiction as we have allowed under *Chuman v. Wright*, 960 F.2d 104, 105 (9th Cir.1992), and, accordingly, denied their motion for a stay. Appellants did not seek a stay from this court.

On January 21, 1994, Judge McDonald ruled that Grabenstein and Reeve were entitled to immunity for seeking the warrant to search but denied them immunity for conduct related to the actual search and, in light of his retention of jurisdiction under *Chuman*, granted the plaintiffs summary judgment on liability as to the search itself, holding that it was conducted pursuant to an invalid warrant. At the same time, the judge reserved certain specific questions as to specific conduct by particular plaintiffs and defendants for trial. The City appellants then filed an amended notice of appeal, appealing the denial of their motion for a stay of proceedings and the summary judgment order. In addition, Reeve's appeal encompassed the denial of his qualified immunity motion. Grabenstein appealed the court's October 21, 1993 failure to grant him qualified immunity in accordance with an extension of time for that purpose granted him earlier by the district court.

Finally, on March 7, 1994, the district court ruled on motions for reconsideration filed by both sides. In this order, Judge McDonald denied Grabenstein and Reeve's

request for reconsideration of his denial of qualified immunity to them. He also clarified some of his liability rulings. The City officers filed second amended notices of appeal from Judge McDonald's ruling on the motions for reconsideration and Grabenstein filed another notice of appeal, appealing the district judge's January 21, 1993 order denying his motion for qualified immunity and granting the plaintiffs summary judgment on liability. Grabenstein's notice of appeal was also from Judge McDonald's order deciding the motions for reconsideration.

We review only three of the four orders appellants ask us to review. The district court's November 24, 1993, order certifying appellants' interlocutory appeal as frivolous and refusing the appellants' request for a stay of further proceedings is not appealable.[8] After applying to

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[8] In *Chuman v. Wright*, 960 F.2d 104, 105 (9th Cir.1992), we recognized an exception to the general rule that a valid notice of appeal divests the district court of jurisdiction over all but tangential matters. This exception applies in cases in which the district court certifies that the defendant's interlocutory appeal is "frivolous" or "forfeited." *See Apostol v. Gallion*, 870 F.2d 1335, 1339 (7th Cir.1989) (explaining that a frivolous qualified immunity claim is one that is unfounded, "so baseless that it does not invoke appellate jurisdiction" and that a forfeited qualified immunity claim is one that is untimely or dilatory). The Supreme Court recently endorsed the district court's power to certify a defendant's interlocutory appeal of the denial of qualified immunity as frivolous or forfeited as a means of protecting civil rights plaintiffs from abusive successive pretrial assertions of qualified immunity. *Behrens v. Pelletier*, ___ U.S. ___, ___-___, 116 S.Ct. 834, 840-41, 133 L.Ed.2d 773 (1996).

In the instant case, Judge McDonald certified appellants' interlocutory appeal as "procedurally frivolous" based on his

the district court for a stay, the City appellants should have applied to this court for a discretionary stay to prevent the district court from proceeding to trial. *See Chuman*, 960 F.2d at 105 n. 1. They failed to do so. We note, however, that the damage to the appellants was limited, because after entering its summary judgment order as to liability and ruling on Grabenstein and Reeve's entitlement to qualified immunity, the district court then certified the City appellants' interlocutory appeal as no longer frivolous and stayed the trial. The three orders we review include among their holdings the

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understandable belief that the appeal prior to resolution of the plaintiffs' summary judgment motion was unwarranted because it could result in a ping-ponging between the appellate and trial courts in contravention of the our circuit's limit of one pre-trial interlocutory appeal for defendants claiming qualified immunity. We had articulated that rule in *Nelson v. Silverman*, 999 F.2d 417, 418-19 (9th Cir.1993) (following *Pelletier v. Federal Home Loan Bank of San Francisco*, 968 F.2d 865 (9th Cir.1992), holding that "a defendant may bring only one-pre-trial appeal of a denial of qualified immunity.").

The district court issued its decision before the Supreme Court's decision in *Behrens v. Pelletier*, ___ U.S. ___, ___, 116 S.Ct. 834, 840, 133 L.Ed.2d 773 (1996), which reversed our decision in *Pelletier*. In *Behrens*, the Court held that a defendant may appeal both the district court's denial of a motion to dismiss on the basis of qualified immunity and a subsequent denial of summary judgment on the basis of such immunity. *Behrens*, ___ U.S. at ___, 116 S.Ct. at 840. Thus, the Court has decided, over Justice Breyer's vigorous objection, *id.* at ___, 116 S.Ct. at 842, that a defendant claiming qualified immunity may indeed have two bites at the appellate apple. *Id.* at ___, 116 S.Ct. at 840. Accordingly, the district court's rationale for its determination of frivolity is no longer tenable, and we see no reason to consider it further here.

denials of appellants' qualified immunity motions in the October 21, 1993, January 21, 1994, and March 7, 1994 orders.[9] *See Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S.Ct. 2806, 2817-18, 86 L.Ed.2d 411 (1985). This case is quite unusual. Ordinarily, if the district court deems the appeal frivolous and the court of appeals agrees, the appeal can be disposed of summarily. When however, the court of appeals concludes that the appeal has some substance, it will ordinarily grant the stay and handle the appeal in the ordinary course. Then, only the rulings made prior to the appeal are potential candidates for review. In the instant case, we consider a non-frivolous interlocutory appeal in the normal course, except that because there was no stay, the district court proceeded to make substantial rulings on the case while the appeal was pending. Thus, here

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[9] Before the district court, the plaintiffs argued that appellants' interlocutory appeal was waived because they could have filed an appeal from Judge McNichols' May 30, 1990 order denying appellants' motion to dismiss on the basis of qualified immunity. The district court did not rule on the plaintiffs' waiver motion in the November 24, 1993 order. However, in a March 2, 1994 order, the court denied the plaintiffs' renewed motion to certify the interlocutory appeal as waived. The plaintiffs renew this argument on appeal and we reject it. Where the appeal is from the denial of motions to reconsider that were decided on entirely different grounds than those relied on by the district court at the time of its initial decision, the opportunity for an interlocutory appeal has not been forfeited. The new grounds upon which Judge McDonald decided the motion to reconsider raise significant legal questions that had not been considered by Judge McNichols. An interlocutory appeal from such an order is appropriate and permits us to consider the new grounds on which the district court relied.

included in the three orders, are additional significant rulings that we are now asked to review.

We conclude that in this case we have jurisdiction to review the district court's rulings granting partial summary judgment on liability,[10] even though those rulings are not independently immediately appealable.[11] We do so because the district court's liability rulings are unquestionably inextricably intertwined with its decisions to deny appellants qualified immunity. *See Swint v. Chambers County Comm'n*, ___ U.S. ___, ___, 115 S.Ct. 1203, 1212, 131

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[10] For the sake of clarity, references to the district court's partial summary judgment order should be understood to refer to both the January 21, 1994 order and the order deciding the parties' motions for reconsideration of that order. In the latter order, the district court simply amended two paragraphs of its partial summary judgment order to specify which defendants were liable to which plaintiffs, denied the "425" plaintiffs' motion for reconsideration of the grant of partial qualified immunity to Grabenstein and Reeve, denied the individual City defendants' motion for reconsideration of the liability judgments, and denied County defendant Grabenstein's motion to reconsider the partial denial of his claim of qualified immunity.

[11] The district court initially certified these orders for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), stating in the orders that they involved controlling questions of law "as to which there is substantial ground for difference of opinion" and that immediate appeal from them "may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). However, a motions panel of this court denied the defendants' petition to appeal these orders immediately pursuant to § 1292(b). The order of the motions panel does not preclude this court from now considering those appeals to the extent that they are inextricably intertwined with the issues over which we have direct appellate jurisdiction.

L.Ed.2d 60 (1995). In reviewing the district court's orders, it is often impossible to separate the court's reasoning or decisions regarding qualified immunity from those regarding liability. The issues are generally analyzed together and are sometimes simply not susceptible of independent review. Equally if not more important, the district court's rulings granting partial summary judgment in favor of the plaintiffs on the issue of liability are dependent on both the reasoning and results of its qualified immunity decisions: a predicate to granting summary judgment in favor of the plaintiffs on the liability issue is the conclusion that appellants are not entitled to qualified immunity. Accordingly, insofar as we reverse the qualified immunity determinations of the district court, our decision also necessarily requires reversal of the consequent liability rulings. To conclude otherwise would result in the anomaly of a conflict between our qualified immunity holdings and the liability determinations of the district court. Thus, to the extent that we hold that appellants are entitled to qualified immunity or that a triable issue regarding qualified immunity exists, we reverse any inconsistent summary judgment decision contained in the district court's January 21, 1994 and March 7, 1994 orders.

I. BACKGROUND

The factual and procedural history of the civil cases relating to this ten year-old search is quite extensive. We set forth below an overview of the most relevant aspects of the events which led up to the civil filings, and of the numerous judicial proceedings, criminal and civil, that have stemmed from those events.

A. Factual Background

In the late spring of 1986, Spokane County Sheriff Detective Rick Grabenstein arrested Michael White in connection with a string of burglaries in Spokane County. White informed Grabenstein that he had sold items of stolen property to James "Sonny" Marks at a residence located at 802 S. Thor and at other unidentified locations, and to other "gypsies," including Grover Marks, at A & A Auto Sales and another residence located at 428 S. Thor.[12] Because the three locations were within the Spokane city limits, Grabenstein contacted the Spokane City Police Department Burglary Task Force, a task force composed of several burglary detectives, plainclothes officers from the patrol division, and a sergeant, under the direction of Lieutenant Larry Freeman. Grabenstein was temporarily assigned to the Task Force to facilitate the investigation.

At the Task Force's request, White attempted to sell purportedly stolen property at 802 S. Thor and 428 S. Thor while the police observed his efforts. White successfully conducted the first such sale on June 10 to James Marks at 802 S. Thor. The investigating officers, including defendants Grabenstein, Reeve, and Neumiller, obtained court authorization to videotape and audio record subsequent conversations between White and individuals at the sale locations. Ensuing successful sales were videotaped on June 12 and June 17. On June 18 at 802 S. Thor,

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[12] The plaintiffs contend that Grover Marks was wrongly identified on a police videotape and that he has never owned, operated, or served as an employee or agent of A & A Auto Sales.

the officers, again using White, attempted another undercover sale. Because of the way the person who answered the door behaved, the officers concluded that she was aware of their surveillance. The investigating officers returned to the police station and informed defendants Freeman and Allen that they believed the investigation had been detected, and thereby compromised, and that they wanted to secure a warrant to search the two Thor residences.

Allen, a captain in charge of the Spokane City Police Department's Investigative Division, authorized the detectives to end the investigation and obtain a search warrant forthwith. Allen also authorized the use of detectives from other units to assist in the search operation and recruited additional personnel from other divisions in the department.

Three officers, Grabenstein, Reeve, and Neumiller, prepared the affidavit in support of the warrant. Neumiller collected the reports of the seventeen burglaries to which informant White had confessed and reviewed them with Grabenstein and Reeve. However, he left during the preparation of the warrant application to participate in a noon briefing of officers who were to assist in the search.

In their affidavit, the officers requested a warrant[13] to search 428 S. Thor and 802 S. Thor, all vehicles on those

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[13] Two warrants were executed in this case, one for 428 S. Thor and one for 802 S. Thor. Except for the different addresses and the fact that the 802 S. Thor warrant specified James Marks as a person to be searched while the other mentioned no individual, the warrants were identical. We will, for the most part, refer to the two warrants with the singular "warrant."

premises, and James Marks, Grover Marks, and any other persons present "for officer safety." The magistrate signed the proposed warrant submitted by the officers at approximately 3:10 p.m. Unlike the request set forth in the affidavit, the warrant authorized searches of all persons on the premises for the purpose of obtaining evidence. Sixteen stolen property reports from White's burglaries and a list of the items White had sold at the Thor residences during the undercover investigation were apparently attached to the affidavit and the warrant.

The officers who conducted the search had varying degrees of information about the scope of the warrant. Grabenstein and Reeve, who had drafted the warrant and sought magistrate approval, saw the completed, signed warrant before they conducted any search activity. Defendants Clarke, Coker, Ennis, Gaunt, Johnson, Keane, Poindexter, and VanLeuven attended a briefing session at which defendants Allen, Freeman, Neumiller and Pavlischak told them about the types of items to be sought under the warrant they expected would be issued – items commonly stolen in residential burglaries, such as jewelry, silverware, electronic equipment and photograpic equipment. The officers who attended the briefing were informed that Grabenstein and Neumiller would be the case managers at the two residences and would each have a copy of the warrant. Other defendants, Bailor, Grub, Krogh, Lavelle, Poole, Stanley, and Yates, received less formal briefing in the form of instructions from other officers. Some of these defendants had participated in the investigation of the alleged fencing operation. Defendant Harding, the Assistant Chief of Police of the Spokane City

Police Department, was apprised of some part of the events of June 18th.

Grover Marks lives at 428 S. Thor and James Marks, Grover's son, lives at 802 S. Thor. The numerous individuals present at 428 S. Thor and 802 S. Thor during the execution of the warrant were all related to Grover Marks and his wife, Marie Marks – they included their children, grandchildren, and one great-grandchild. Not all the individuals present, however, resided at the two residences.

All the plaintiffs are members of the Kalderasha tribe of Rom, or "Gypsies." Plaintiffs assert that at the time of the search and for a number of years preceding it, Grover Marks was the "baro" or "king" of his Rom community. As such, he assumed important political, cultural, and religious responsibilities. Grover Marks also contends that he served as a "private banker" responsible for safeguarding jewelry and other property of the community and its individual members throughout the northwestern United States. According to the plaintiffs, the baro of the Rom is also responsible for arranging payment for and hosting religious feasts and the weddings and funerals of community members.

Some officers were assigned to watch the Thor residences while others were assigned to the preparation of the warrant application and to obtaining the warrant. Officers began arriving at "the staging area," which was somewhere near the two residences, to await the receipt of the warrant approximately two hours before it was signed by the magistrate. At least an hour before the warrant was signed, defendant Weir stopped a vehicle leaving 428 S. Thor that was driven by plaintiff David

Marks for a moving-traffic violation. Plaintiffs Jane Marks, Laura Zeko, and Chrissie Zeko were passengers in the vehicle. While Weir was speaking with David Marks, defendant Grub arrived and directed the individuals in the car to return to the house and wait for the search warrant. The driver and three passengers returned to 428 S. Thor and entered the residence. Around the same time, defendant Bailor stopped plaintiff James Marks, who was observed putting a container in the trunk of his car, as he was driving away from 802 S. Thor. The ostensible reason for the stops was the absence of a license plate.[14] Defendant Bailor, along with defendant Lindskog, conversed with James Marks and searched his vehicle with his consent, after which Marks, perhaps as requested, returned to his residence at 802 S. Thor.

The plaintiffs contend that officers VanLeuven, Keane, and Poindexter forcibly entered 428 S. Thor; appellants contend that Marie Marks invited the officers inside. Appellants also contend that James Marks invited Neumiller and other officers to enter 802 S. Thor and consented to a search of his home, informing the officers that a warrant was not necessary.[15] Plaintiffs do not offer evidence to refute the contention that James Marks initially consented to a warrantless search of his home;[16]

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[14] James Marks' twelve year-old son, Michael Marks, was also in the car.

[15] The officers assert, however, that they declined the invitation to search, and instead waited for the arrival of the warrant.

[16] In their brief, plaintiffs do assert that appellants "began the warrantless search by forcibly barging into the homes at 428 S. Thor *and 802 S. Thor.*" This assertion is supported with

however, the record supports the inference that, at some point during the course of these events, Marks withdrew his initial invitation and consent.[17] The plaintiffs assert that the search began hours before the warrant was even issued and was therefore invalid.[18] Appellants contend

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citations to the record preceded by the signal "[s]ee, for example." Unfortunately, none of the cited material refers to the search at 802 S. Thor, and, unaided, we have been unable to locate material in the voluminous record that would support plaintiffs' contention. Accordingly, we treat as undisputed, appellants' documented claim that James Marks initially invited them into his home and consented to a search of the premises.

[17] For example, Det. Neumiller states in his affidavit that Marks refused to open a safe discovered on the premises until the officers threatened to get a locksmith to open it forcibly. Marks then opened it quickly and slammed it shut. Neumiller then "order[ed]" Marks to open it again. Neumiller also states in his affidavit that after inspecting the warrant, Marks's attorney "told Mr. Marks that he should allow the search," suggesting that prior to that time Marks had, at least at some point, refused to do so. Accordingly, we conclude that the issue of consent to search the premises at 802 S. Thor is genuinely disputed by the parties.

[18] Several plaintiffs have stated in affidavits that the search began prior to the hour at which the warrant was issued by the magistrate. The plaintiffs also argue that testimony from state criminal and civil proceedings stemming from the search supports their contention. They point to testimony of the attorney called by Grover Marks during the search, several neighbors, and a postman. This third-party testimony makes it clear that the officers were present before the search warrant was authorized but does not answer the question whether the search was actually proceeding or whether the officers had simply secured the area. The plaintiffs also contend that the facts that the Spokane Fire Department received a call for assistance at 2:56 p.m. and that an ambulance arrived at 3:09, before the warrant was issued, along with officer testimony as

that the search did not commence until after copies of the search warrant were delivered to 802 S. Thor by Reeve and to 428 S. Thor by Grabenstein.[19]

The individual defendants were involved in the search operation in varying degrees. For instance, defendant Weir's only participation was his traffic stop of the vehicle driven by David Marks. Defendant Clarke evidently never entered either house and simply provided perimeter security. Defendant Lavelle videotaped the searches at both residences but did no searching himself. Other officers may have gone inside the homes but did not participate directly in any search or actual seizure. Some officers may have searched persons as well as the premises, while others may have performed only the latter type of search. Also, some of the defendants managed or supervised the search. Grabenstein and Neumiller served as the "case managers" in charge of the search at 428 S. Thor and 802 S. Thor, respectively. Freeman, who was back at the police station oversaw the search from there; officers at the search scene informed him of developments as they unfolded. Freeman monitored the search closely and periodically phoned defendant Allen and shared the information with him.[20]

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to when during the search the ambulance was called, prove that the search began before the warrant was issued. The defendants counter that the ambulance was called to "stand-by" before the search began, according to normal police procedure.

[19] The appellants state that the officers did execute a "protective sweep" of the residences before the warrants arrived to ensure their safety.

[20] Allen left the police station sometime after the warrant was signed and went home.

Plaintiffs Grover and Marie Marks, their daughter Marguerite Marks and her child Steve Marks (23 months), their son Robert Marks and his children Richard (11 years) and Steven Marks (10 years), their daughter Laura Zeko and her four children Robert (11 years), Jason (9 years), Chrissie (6 years), and Sonny Zeko (7 months), their son Peter Marks and his son Buck Marks (6 years), and their daughter-in-law Jane Marks and her son David Marks were present during the search of 428 S. Thor. Plaintiffs James Marks and his son Michael Marks were present during most of the search of 802 S. Thor, but left to visit 428 S. Thor while the search of the latter residence was still in progress, and may have been searched there. Plaintiffs Larry Zeko (husband of Laura Zeko and father of Robert, Jason, Chrissie, and Sonny Zeko), Tommy Marks (father of Sonny Marks), and Tina Marks (daughter of James and Jane Marks) apparently were not present during the search of either residence. There is a dispute among the parties as to whether appellants confined Polly Marks and her daughters Shirley Marks and Lisa Marks outside the residence of 428 S. Thor during the search. The plaintiffs contend that Marie Marks and Linda Marks were "restrained" outside 428 S. Thor during the search.

The plaintiffs allege that officers detained and searched all persons who were initially inside the two residences and all who entered during the law enforcement operation. Appellants say they searched "some," but not all, of the persons present. It is unclear which officers searched which plaintiffs. However, the parties agree that defendant Coker conducted the searches of

women and children.[21] Appellants also claim that the Markses were generally very disruptive during the search and continually attempted to hide items that were subject to seizure.

Approximately 200 items of personal property were seized at 802 S. Thor, and approximately 440 items, including seven canisters of money, were seized and removed from 428 S. Thor. Prior to leaving the residences, the officers photographed and videotaped much of the property, including the canisters, as well as the persons present. The property included jewelry, electronic equipment, cashier's checks, car titles, and cash sewn in blankets and stashed in boxes. No cash was seized at the 802 S. Thor residence.

Extraordinary sums of cash were discovered during the search of 428 S. Thor. Because money was not specifically listed in the search warrant, the officers did not seize approximately $10,000 in cash when it was first discovered. However, when another significant amount was discovered and its discovery reported to Freeman by telephone, the officers were authorized by Allen and Freeman to begin seizing all the cash they uncovered. The officers did so and seized money they found in several locked boxes and canisters in a chest of drawers with a false bottom. Robert Marks was arrested while some of the cash was being discovered.

Later in the search, the officers telephoned Freeman and Allen and were directed by them to take all the

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[21] Appellants' attempt to characterize these searches as mere "pat-down[s]," is wholly unsupported by the record.

confiscated property and transport it to the police station for identification. The property the officers took to the station included that confiscated from various places throughout the residences and from the persons of those Marks family members present during the search. At the station, officers cross-referenced their inventory lists from the search at 802 S. Thor with the items placed in the property room, continued inventorying items from 428 S. Thor, and counted the money found at 428 S. Thor.

James and Grover Marks accompanied the police and property to the police station. The Internal Revenue Service sent two investigators to the station to observe the counting of the money. The counting and inventorying of the money was ultimately completed around 1:00 a.m. June 19, 1986. A total of approximately $1,600,000 was counted by the police.

On June 23, the City was served with a Writ of Garnishment in the amount of $42,864.89. The plaintiff in the garnishment action was an individual named Paul Richards. The defendants in the garnishment were several of the plaintiffs in this case, including Grover, Marie, James, and Jane Marks. Also on June 23, the IRS served a series of liens and notices of seizure on the City of Spokane for the cash seized from Grover Marks' residence pursuant to levies made against several members of the Marks family. The levies were served on the City before the Spokane Superior Court ruled that the money seized during the search of 428 S. Thor should be returned to the owner of the residence.

The IRS seized all of the cash in the City's custody, except for $43,000 that was subject to the garnishment

previously served against the City. The City deposited the $43,000 into a separate bank account to cover the garnishment. The City then paid $42,864.89 into the Spokane County Superior court as ordered on July 31 and paid the remaining balance of the bank account, $357.79, to the IRS pursuant to the original notices of levy and seizure. In accordance with a stipulation entered into by the parties, the IRS returned $519,000 and later, as part of a tax settlement, returned all but $300,000 of the remaining $1 million.

Also in July 1986, the Spokane Police Department conducted a viewing of the property seized during the June 18 search. According to appellants, the viewing was limited to burglary victims: (1) who could prove that they were the victim of a crime during the last three years that had been reported to a law enforcement agency; (2) a copy of whose crime report could be located in law enforcement records; and (3) whose report described the items stolen. Approximately 35 of these crime victims identified numerous items they claimed had been stolen from them.

B. Procedural Background

1. State Court

Pursuant to a Washington state criminal rule allowing persons aggrieved by an unlawful search and seizure to move the state court for the return of the property on the ground that it was illegally seized, the Markses moved for return of the seized cash on June 20, 1986, two days after the search. That same day, after an expedited hearing on the matter, the state court, Magistrate Judge

Ramond R. Tanksley, ordered the return of the approximately $1.6 million in cash that had been seized from Grover Marks' residence at 428 S. Thor, ruling that the cash was outside the scope of the warrant and that the plain view exception to the warrant requirement did not apply because, although the officers were legally present and the cash was inadvertently discovered, it was not immediately identifiable as evidence of a crime.

After obtaining the order directing the return of the cash, the Markses moved for the return of the other seized property or in the alternative to suppress the property as evidence. In October and November 1987, the Spokane Superior Court ordered the State of Washington to return to the Markses all the property that had not been identified as stolen. The items that had been characterized as stolen, remained subject to further proceedings in court.

Earlier, the State of Washington had charged James Marks, Jane Marks, Grover Marks, and Marie Marks with trafficking in stolen goods. In May 1988, the Markses moved to suppress all evidence seized during the search and to dismiss the criminal charges against them. After a lengthy evidentiary hearing, the Spokane court held that the police exceeded the authorization in the search warrant, conducted illegal searches because the searches and seizures made by the officers were unreasonable and the warrant itself failed to particularize the items to be seized, and that the officers were guilty of mismanagement and governmental misconduct, in violation of the Fourth and Sixth Amendment of the United States Constitution, Article I, section 7 of the Washington State Constitution, and Washington state criminal laws. The court

suppressed all the seized evidence, dismissed the underlying criminal charges, and ordered the police to return all confiscated property to the Markses.

The State of Washington appealed the state trial court's order dismissing the charges and directing the return of property which had been identified as stolen. However, the state did not appeal the order suppressing all the evidence seized. The City of Spokane joined the appeal of the order directing return of the property because the City had custody of the items and was made subject to an order to show cause at the request of the Markses. The Washington Supreme Court reversed the trial court's order of dismissal and reinstated the criminal charges, holding that dismissal was unwarranted because suppression of the evidence eliminated any prejudice caused by the governmental misconduct, and remanded the matter to the trial court for an evidentiary hearing to determine who had the lawful right to possession of the disputed property. *State v. Marks*, 114 Wash.2d 724, 790 P.2d 138, 145 (1990). Ultimately, the criminal charges against Grover and Jane Marks were dismissed, and Marie and James Marks entered "Alford" pleas to reduced charges and paid fines.

2. Federal Court

In June 1989, the Markses instituted the two, now consolidated, civil rights actions against the City of Spokane, Spokane County, and the individual defendants out of which this appeal arose. The plaintiffs in Cause No. C-89-423-AAM (the case primarily involving events at the 802 S. Thor residence) are James Marks, Jane

Marks, Tommy Marks, David Marks, Marie Marks, Michael Marks, Sonny Marks, Linda Marks, and Tina Marks. The plaintiffs in Cause No. C-89-425-AAM (the case primarily involving events at the 428 S. Thor residence) are the Gypsy Church of the Northwest, a voluntary association, by and through Grover Marks, trustee; and Grover Marks, Marie Marks, Marguerite Marks, Steven Marks, Robert Marks, Polly Marks, Richard Marks, Shirley Marks, Lisa Marks, Steve Marks, Larry Zeko, Laura Zeko, Robert Zeko, Jason Zeko, Chrissie Zeko, Sonny Zeko, Peter Marks, and Buck Marks.

The plaintiffs sued the City of Spokane and city employees Robert Allen, Robert Bailor, John Clarke, Denise Coker, Earl Ennis, Larry Freeman, Monte Gaunt, William Grub, Clifford Harding, Donald Johnson, Stephen Keane, Ken Krogh, Michael Lavelle, Larry Lindskog, Jack Neumiller, Andrew Pavlischak, Gerald Poindexter, Richard Poole, Sheldon Reeve, Nicolis Stanley, Robert VanLeuven, and Michael Yates and Spokane County, Larry Erickson, and Rick Grabenstein.

II. OVERVIEW

In the three orders we are reviewing, the district court first denied qualified immunity to all appellants[22]

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[22] The district court apparently concluded that defendant Weir, a police officer whose only role in the search was stopping a vehicle that left the residence before the warrant arrived, was not entitled to qualified immunity because there was a material dispute as to whether the traffic stop was pretextual and that defendant Harding, Assistant Chief of the Spokane City Police, was not entitled to immunity because of a material dispute as to

and then held most of them liable for their participation in an unlawful search conducted pursuant to an invalid warrant.[23] The court held that the warrant was overbroad and that it was invalid because it (1) authorized a "general" search in violation of the Fourth Amendment's requirement that warrants describe with particularity the items to be seized and (2) authorized the search of all persons on the premises for reasons other than officer safety without the requisite individualized probable cause. The court also held that the officers erred in failing to take the necessary actions to gain an understanding of the specific provisions of the warrant and in failing to refer to those provisions while conducting the search. Finally, the court held that disputed facts as to exactly what role particular defendants played in the search and as to what the various defendants did or did not do to the

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his role in the search. With respect to Weir, as we discuss more fully below, we reverse the decision of the district court in light of the Supreme Court's recent decision in *Whren v. United States*, ___ U.S. ___, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). With respect to Harding, under the Supreme Court's holding in *Johnson v. Jones*, ___ U.S. ___, ___, 115 S.Ct. 2151, 2156, 132 L.Ed.2d 238 (1995), we are without jurisdiction to review a decision of the district court denying qualified immunity where that decision turns on the existence of a genuine issue of material fact.

[23] It is undisputed that all appellants except Harding and Weir participated in the search. We note that some of those who participated – appellants Allen and Freeman – did not physically engage in the search and were not present at the residences, some – those officers who only "secured" the premises – did not actually search persons, or even the homes, for evidence, and one, Lavelle, did not search or secure but rather videotaped the actions of others.

various plaintiffs required that the extent of liability of most of the defendants be resolved at trial.

We agree with most of the results reached by the district court in connection with its denials of appellants' motions for qualified immunity, but we reverse in large part its decisions granting summary judgment to plaintiffs on the issue of liability. First, we affirm the district court's denial of immunity to the officers who were involved in *obtaining* the search warrant, a group that includes the officers who prepared and applied for the warrant – defendants Grabenstein, Reeve and Neumiller[24] – and the two superior officers who authorized them to apply for the warrant – defendants Allen and Freeman. We do so on a basis that differs in some important respects from that relied on by the district court. The district court held that, even though the officers who sought the warrant could not have "harbored an objectively reasonable belief" that the warrant was supported by probable cause to search all persons or that it described the items to be seized with sufficient particularity, they were entitled to qualified immunity because the affidavit and draft warrant had been approved by an attorney and the magistrate had issued the warrant. However, it then denied them qualified immunity on the ground that their failure to "constant[ly] reference" the warrant during the search was unreasonable.[25] We reject

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[24] Neumiller assisted Grabenstein and Reeve in preparing the warrant application but went to the 802 S. Thor residence before the warrant was authorized by the magistrate.

[25] While the district court did not explain how this rationale would support the denial of Allen's and Freeman's

the district court's reasoning in part. We hold instead that the qualified immunity motion must be denied because the officers unreasonably obtained and executed a warrant to search *all* persons present for evidence. We rely principally on the fact that the affidavit that supported the warrant not only was lacking in any indicia of probable cause to search *all* persons but itself requested permission only to search two persons – James and Grover Marks – for evidence of the crime under investigation – and all others solely for officer safety.

As to those officers who actively participated in the search of the persons present at the premises during the execution of the warrant, we affirm the decision of the district court denying them qualified immunity. Once again, we do so for a different reason, at least in part, than was relied on by the district court. Once again, we do not rely on the officers failure to examine the warrant or apprehend its precise provisions. Instead we conclude that regardless of the terms of the warrant, the law was clearly established that the officers could not search all persons present on the premises in the absence of individualized probable cause.[26]

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motions, that failure is irrelevant given the rationale we employ here.

[26] We need not consider whether qualified immunity might apply in the case of an officer who searched only the one individual specifically named in the warrant, only the two individuals as to whom permission to search was sought in the affidavit, or only those two individuals plus any others as to whom the affidavit established probable cause. No appellant asserts that his conduct was so limited.

The court's denial of qualified immunity to all the officers who participated in the search of the *premises* but were not involved in obtaining the warrant or in searching persons present is justified, but again on a ground different from that on which the judge relied. On the record before us, we conclude that those officers are not presently entitled to immunity because a material dispute of fact exists: whether the search in which they participated began before or after the warrant arrived.[27] The district court held that whether the search began prior to the issuance of the warrant was a fact in dispute but did not consider the fact material because it had denied immunity to the defendants who participated in the search on a different basis. Because we disagree with the district court's rationale – that the warrant was a general warrant and the search was a general search – we conclude that the disputed fact is material and that, as such, a dispute of material fact exists that bars summary judgment.[28] Accordingly the officers who searched only the *premises* were not entitled to a summary judgment order granting them qualified immunity.

Similarly, as to those officers who only secured the premises and detained those present, but did not search

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[27] As noted above, *supra* at p. 1020, and as explained again below, *infra* at p. 1032, we also conclude that a genuine issue of material fact exists concerning whether, if the search of 802 S. Thor began before the arrival of the warrant, James Marks consented to a warrantless search.

[28] We also conclude that the disputed fact is material to the disposition of appellant Lavelle's qualified immunity motion, and accordingly we hold that summary judgment on that ground is inappropriate at this time for him as well.

any person or property, we hold that qualified immunity is inappropriate at this stage of the proceedings. Under the facts as alleged by the plaintiffs, the officers secured the premises and detained persons present in furtherance of an illegal, warrantless search. If the search began before the warrant arrived, these officers are not entitled to qualified immunity. Accordingly, because a genuine issue of material fact exists regarding the conduct of appellants who secured the premises, summary judgment on qualified immunity is not appropriate at this time.[29]

Finally, in light of the Supreme Court's decision in *Whren v. United States*, ___ U.S. ___, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996), we hold that the officers who conducted the traffic stops are entitled to qualified immunity because plaintiffs do not dispute appellants' assertions that probable cause existed to effect the stops.[30] We also conclude that the officers who participated in transporting the seized property to the police station for an off-site inspection are entitled to qualified immunity on the ground that their conduct did not violate clearly established law.

Where our decisions on qualified immunity conflict with the district court's decision on liability we necessarily reach and reverse the latter. Specifically, our qualified immunity conclusions require us to reverse the

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[29] We express no view as to whether individual officers may have engaged in specific conduct during the course of the search of persons or the premises that would serve as additional reasons for depriving them of qualified immunity.

[30] We except Grub, who apparently ordered some of the plaintiffs to return to the house. See discussion *infra* p. 1033.

district court's order imposing liability against those officers who only searched, videotaped, or secured the premises at 428 and 802 S. Thor, including those who detained but did not search the persons present. However, we affirm the decision imposing liability against that smaller number of appellants who conducted the search of the persons found on the premises. Because the district court did not treat separately the issue of imposing *liability* for the obtaining of the warrant, that issue is not properly before us on this appeal. The district court will undoubtedly, however, review that question on remand in light of our parallel ruling on qualified immunity – that, under the circumstances of this case, clearly established law prohibited the obtaining of a warrant for the search of all persons present.

III. SUMMARY JUDGMENT ISSUES

Whether appellants are entitled to summary judgment on the basis of qualified immunity depends upon "whether, in light of clearly established principles governing the conduct in question, the officer[s] objectively could have believed that [their] conduct was lawful." *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir.1993). The two-part analysis we use to apply this standard is: "(1) Was the law governing the official's conduct clearly established? (2) Under that law, could a reasonable officer have believed the conduct was lawful?" *Id.* Appellants are not entitled to summary judgment on the basis of qualified immunity if a genuine dispute of material fact exists. *Pierce v. Multnomah County*, 76 F.3d 1032, 1038 (9th Cir.1996); *Act Up*, 988 F.2d at 872. Plaintiffs, conversely, are only entitled to summary judgment on liability if no

material dispute of fact as to the appellants' liability exists for trial. *Warren v. Carlsbad*, 58 F.3d 439, 441 (9th Cir.1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1261, 134 L.Ed.2d 209 (1996).

1. Qualified Immunity

Obtaining the Warrant

The district court concluded that the affidavit submitted by Grabenstein and Reeve failed to establish probable cause sufficient to support the general "any persons on the premises" searches authorized by the actual warrants: more specifically, it determined that those appellants "could not have harbored an objectively reasonable belief in the existence of probable cause to search any individuals other than Grover and Sonny Marks." ER at 1480. Nevertheless, the court granted them qualified immunity on the issue because they "reasonably relied" on the approval given both by the Spokane County Deputy Prosecutor who approved the affidavit and the draft warrant and the magistrate who signed the warrant. We disagree, and conclude that such approval is insufficient to entitle these defendants to qualified immunity. *See Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986).[31]

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[31] In *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986), the Supreme Court made it clear that the objective reasonableness inquiry employed to determine an officer's entitlement to qualified immunity "is whether a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to established probable cause and that he should not have applied for the warrant." *Id.*

The conduct of these defendants with respect to the claim at issue falls under the clearly established rule set out in *Ybarra v. Illinois*, 444 U.S. 1049, 100 S.Ct. 741, 62 L.Ed.2d 737 (1980). In *Ybarra*, the Court held that

> Where the standard is probable cause, a search or seizure of a person must be supported by *probable cause particularized with respect to that person*. This requirement cannot be undercut or avoided simply by pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be.

Id. at 91, 100 S.Ct. at 342 (emphasis added). While holding open the question of the constitutional propriety of a warrant that specifically authorized the search of "unnamed persons in a place," the Court did so only to the extent that such a warrant is "supported by probable cause to believe that persons who will be in the place at the time of the search will be in possession of [items subject to seizure]." *Id.* at 92 n. 4, 100 S.Ct. at 342 n. 4. *See also Greenstreet v. County of San Bernardino*, 41 F.3d 1306, 1309 (9th Cir.1994) ("A search warrant designating more

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at 345, 106 S.Ct. at 1098. *Malley* clearly established that determining whether an officer seeking a search warrant is entitled to immunity is not limited to considering whether that officer sought advice from others, such as attorneys, before seeking the warrant or whether a magistrate ultimately authorized the warrant. *Id.* The officer applying for the warrant is required to minimize the danger of an unlawful arrest "by exercising reasonable professional judgment." *Id.* The objective reasonableness inquiry "is confined to the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization." *Id.*

than one person or place to be searched must contain sufficient probable cause to justify its issuance as to each person or place named therein.").

Accordingly, unless supported by probable cause as to each individual present, the warrants here were invalid, and the conduct of the officers in obtaining the warrants violated clearly established law of which a reasonable officer would have known. We agree with the conclusion of the district court that the warrants' authorization to search "any persons on the premises" was not supported by probable cause, and that "Grabenstein and Reeves could not have harbored an objectively reasonable belief" that such probable cause was shown. First, the affidavit submitted in support of the warrant did not seek authorization to search all persons present for evidence. The affidavit stated that the affiant sought a warrant for the purpose of searching persons described as "James Marks, Grover Marks, and any other person on the premises at the time of warrant execution *for officer safety.*" (emphasis added) The draft warrant Grabenstein and Reeve submitted along with the affidavit contained a different description of the "persons" to be searched, however. It sought the broader, indeed unlimited, authorization to detain and search "James S. Marks, aka 'Sonny' and all other persons on the premises of S. 802 Thor, Spokane County, Washington" and "Any persons on the premises of S. 428 S. Thor, Spokane County Washington." Unlike the affidavit, the draft warrant did not

contain the officer safety limitation as to persons who happened to be on the premises.[32]

Second, while the facts presented in the affidavit clearly supported the conclusion that stolen property was present at 428 S. Thor and 802 S. Thor, it did not establish probable cause to search all persons present for evidence of the crimes. The affiant stated that several robbers had provided information that stolen property was sold by informant White to persons at those two addresses and that the affiant himself had orchestrated and conducted surveillance of undercover sales of stolen property by White to James "Sonny" Marks and one other unidentified person at the residences. However, no-one other than James Marks, Grover Marks, Tommy Marks, a "gypsy" named "Terry", and an unidentified "female" at 428 S. Thor, was even mentioned in the affidavit as a suspect, other than a vague reference to "Gypsies" generally. While the affidavit may have established probable cause to search James Marks, and possibly also Grover Marks, Tommy Marks, and a "gypsy" named "Terry" for evidence of trafficking in stolen goods, none of the statements in the affidavit established probable cause to detain and search any other individuals for evidence. A warrant to search all "Gypsies" found at a particular location would, of course, be invalid – although it would in fact be more specific or limited than the all persons warrant issued here.

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[32] The draft warrant was apparently signed by the magistrate without change.

The actions of the officers who applied for a warrant to search all persons present for evidence of crimes when the affidavit they submitted in support of that warrant (1) clearly stated that the officers sought only to search two individuals, James Marks and Grover Marks for that purpose, and (2) obviously failed to establish probable cause to search persons other than those identified in the affidavit, "violate[d] clearly established statutory or constitutional law of which a reasonable officer would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). While the first error alone might not serve to deprive the officers of qualified immunity, the combination of the first and the second clearly does.

We reject the conclusion of the district court that the officers are insulated by qualified immunity because of their reliance on the approval given by an attorney and the magistrate who signed the warrant. We recently noted in *United States v. Kow*, 58 F.3d 423 (9th Cir.1995), that the fact that a warrant was reviewed by two Assistant United States Attorneys and signed by a magistrate does not amount to "exceptional circumstances" on the basis of which a reasonable officer could rely on a facially invalid warrant. *Id.* at 428. We have held that "absent *specific assurances* from an impartial judge or magistrate that the defective warrant is valid despite its overbreadth, a reasonable reliance argument fails." *Id.* at 429. The officers applying for the warrant in this case did not ask for, nor did they receive any such specific assurances from the magistrate issuing the warrant. To the contrary, it appears that the magistrate may have been misled by the terms of the request set forth in the affidavit, and may not have

noticed the conflict in the papers submitted to him. Accordingly, we hold that the officers who obtained the warrant authorizing searches of "any persons on the premises" are not entitled to qualified immunity for that conduct.[33]

Search of "Any Persons"

We also affirm the district court's denial of qualified immunity as to the appellants who participated in the search of persons who were present when the warrant was executed. As we have just stated, the warrant at issue in this case was invalid insofar as it authorized a search of "any person present." Once again, under the clearly established law of *Ybarra v. Illinois*, 444 U.S. 85, 91, 100 S.Ct. 338, 342, 62 L.Ed.2d 238 (1979), "[w]here the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person." As noted above, the affidavit submitted in support of the warrant application at most established probable cause to search Grover, Sonny, and Tommy Marks, as well as a "gypsy" named "Terry." Insofar as the warrant purported to authorize searches of "any persons on the premises," it was invalid, as unsupported by particularized probable cause.

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[33] Those officers are also not entitled, as the district court found, to qualified immunity for their actions in searching the persons present on the premises, nor for instructing other officers to conduct searches of such persons.

Notwithstanding the warrant's invalidity, appellants who searched the various plaintiffs are nevertheless entitled to rely on the warrant, and will not be stripped of qualified immunity, so long as their reliance is objectively reasonable. *United States v. Leon*, 468 U.S. 897, 920-921, 104 S.Ct. 3405, 3419, 82 L.Ed.2d 677 (1984). However, an officer is not entitled to rely on a warrant which is "so facially overbroad as to preclude reasonable reliance by the executing officers." *Id.* at 923, 104 S.Ct. at 3420-21; *See also United States v. Luk*, 859 F.2d 667, 677 (9th Cir.1988); *United States v. Crozier*, 777 F.2d 1376, 1381 (9th Cir.1985). The burden is on appellants to prove that their reliance on the warrant was objectively reasonable. *United States v. Michaelian*, 803 F.2d 1042, 1048 (9th Cir.1986).

In this case, if the overbreadth of the warrant with respect to searching "any person present" was not immediately apparent at the pre-search briefing session, its invalidity certainly became apparent, at the latest, when the officers were confronted with the duty of searching dozens of people, including children, even to the point of "inspecting" the diaper of an infant. In whatever limited circumstances a blanket "any person present" warrant might survive *Ybarra*'s clear requirement of "probable cause particularized with respect to [each] person," 444 U.S. at 91, 100 S.Ct. at 342, the circumstances of the execution of this warrant made it unreasonable for an officer to believe that it was not facially overbroad.

Appellants argue that a search of all persons was justified because "[u]nder the facts and circumstances confronting the officers, they justifiably concluded that they were in a 'den of thieves.' " We have not previously commented on a "den of thieves" theory in a published

opinion. However, we believe that a warrant to search "all persons present" for evidence of a crime may only be obtained when there is reason to believe that all those present will be participants in the suspected criminal activity. That is not the case here, and would not be the case with respect to a raid on any family home where innocent family members or friends might be residing or visiting. An all persons present warrant might be appropriate for a different kind of locale – one dedicated exclusively to criminal activity – for example, a building or apartment used as a crack house, a barn used as a methamphetamine lab, or a warehouse used exclusively as a storage place for arms. Here, as we have noted, however, large numbers of family members, including children, were, as the officers might have anticipated, present before and during the search. The approach we adopt was set forth almost a quarter century ago by the New Jersey Supreme Court, which stated that

> [a] showing that lottery slips are sold in a department store or an industrial plant obviously would not justify a warrant to search every person on the premises, for there would be no probable cause to believe that everyone there was participating in the illegal operation. On the other hand, a showing that a dice game in a manhole or in a barn should suffice, for the reason that the place is so limited and the illegal operation so overt that it is likely that everyone present is a party to the offense.

State v. DeSimone, 60 N.J. 319, 288 A.2d 849, 850 (1972); *see also* 2 W. LaFave, Search and Seizure § 4.5(e), at 546 (3d ed. 1996) (endorsing the limited rationale outlined in

DeSimone as the proper analysis for "all persons present" warrants.).

The cases cited by appellants do not support their argument. They consider the reasonableness of an officer's conclusion that items found in plain view constitute incriminating evidence and do not consider the question of suspending the individualized probable cause requirement governing searches of persons. *State v. Legas,* 20 Wash.App. 535, 581 P.2d 172, 176 (1978); *State v. Adame,* 37 Wash.App. 94, 678 P.2d 1299 (1984). In this case, appellants' "den of thieves" argument is simply a more sophisticated and beguiling version of the kind of justification forbidden by *Ybarra:* "Persons detained during a search for evidence cannot be searched according to *Ybarra* simply because they are there," *United States v. Vaughan,* 718 F.2d 332, 335 n. 7 (9th Cir.1983). Accordingly, those appellants who conducted indiscriminate searches of all persons present at the family residences failed to act in an objectively reasonable manner, and are not entitled to qualified immunity.

Officers Who Searched the Premises

The district court relied on our decision in *Guerra v. Sutton,* 783 F.2d 1371 (9th Cir.1986), to reach its conclusion that the officers in this case had a duty to read and refer to the specific authorizations in the warrant during the search. We have not found nor do the plaintiffs point us to any authority ascribing to police officers a duty *personally* to read the search warrant they are executing or to refer to that warrant *during* its execution. The plaintiffs, like the district court, rely on *Guerra,* a case which

does not support their argument. While we did hold in *Guerra* that officers executing a search warrant have a duty to inquire as to the nature, scope, and details of the warrant, we also made it clear that it is not necessary for "all or even any" of the officers executing the warrant "to actually *see*" it. *Id.* at 1375. "Officers conducting a search should read the warrant *or otherwise become fully familiar with its contents*, and should carefully review the list of items which may be seized." *United States v. Whitten*, 706 F.2d 1000, 1009-10 (9th Cir.1983) (emphasis added), *cert. denied*, 465 U.S. 1100, 104 S.Ct. 1593, 80 L.Ed.2d 125 (1984).

In *Guerra*, we held that INS agents who failed "to inquire as to the nature and scope" of the warrant they were executing were not entitled to qualified immunity. *Id.* at 1375. We denied the agents immunity because it was clear that they had not sought to determine specific information regarding what the warrant authorized them to do. *Id.* In contrast to the officers who executed this warrant, the *Guerra* agents had "between four and six different understandings of what kinds of warrants the local police obtained and who and/or what they were for," *id.* at 1375 n. 5, and were not given an advance briefing as to the source and extent of their authority to enter and search, *id.* at 1375.

Prior to the searches of the two residences, the officers in the case before us were briefed about the warrant being sought, the nature of the criminal investigation – that investigators had substantial evidence that persons at the residences were trafficking in stolen property – and

the nature of the evidence to be seized – primarily jewelry, silverware, and electronic and photographic equipment stolen in household burglaries. Also, many of the officers had participated in the pre-search investigation of the alleged fencing operation. These officers were particularly familiar with the nature of the items sought. Although every officer did not attend the formal briefing, each officer was informed in some way by authorized personnel regarding the scope of the search. Thus, the district court erred in concluding that clearly established law imposed a duty on the officers, who had generally fulfilled their duty to become informed as to the scope of the warrant, to read or refer to the signed warrant while they searched. Accordingly, we hold that the district court erred in denying the defendants qualified immunity on that basis.

We also hold that the district court erred in concluding that the searches were conducted pursuant to an invalid "general warrant." Instead, we hold that the warrant at issue satisfied the Fourth Amendment requirement of particularity insofar as it authorized a search of the premises for the types of property described therein.

> The requirement that a warrant not be a general one is in part a function of the probable cause rule and is in part derived from the fourth amendment requirement that warrants be ones "particularly describing the place to be searched, and the persons or things to be seized."

United States v. Hillyard, 677 F.2d 1336, 1339 (9th Cir.1982).

On this warrant, in the space designated for describing the things to be seized, the words "see attached lists"

were typed. Attached to the warrant were the lists that had been attached to the affidavit – the list of the items that informant White had sold to individuals at the two residences during the police investigation and the sixteen stolen property reports listing the items stolen from the property owners who filed the reports.[34]

The stolen property lists attached to the warrant included descriptions of hundreds of items of property, mostly jewelry and silverware. The descriptions varied from detailed – "Black Hills Gold Earrings (Landstrom's)" [along with a detailed drawing]; "camera [serial number] B2103134 [brand] Nikon [model] FE-2 Black" – to vague – "A gold chain;" "Bottle of Liqueror" [sic] and "3 Quarters." The list prepared by the officers also described the items to be seized in varying degrees of detail. That list included rather general descriptions such as "A gold rope chain," "A flat gold chain," "2 gold bands," but also included more detailed descriptions, such as "A men's Bulova silver colored watch, serial # C92458," "A silver mask earring," and "Queens Lace Sterling silverware (3 crab forks, 2 butter knives, 3 salad forks, 3 dinner forks, 5 teaspoons, 3 soup spoons)."

We have held that:

> [t]he specificity required in a warrant varies depending on the circumstances of the case and the types of items involved. Warrants which

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[34] At one point in their brief, the plaintiffs appear to contest the fact that the lists were attached to the affidavit and warrant. However, the rest of their brief treats the issue as immaterial and refers to the attached lists as if they were in fact attached to the warrant.

> described generic categories of items are not necessarily invalid if a more precise description of the items subject to seizure is not possible. In determining whether a description is sufficiently precise, we have concentrated on one or more of the following: (1) whether probable cause exists to seize all items of a particular type described in the warrant; (2) whether the warrant sets out objective standards by which executing officer can differentiate items subject to seizure from those which are not; and (3) whether the government was able to describe the items more particularly in light of the information available to it at the time the warrant was issued.

United States v. Spilotro, 800 F.2d 959, 963 (9th Cir.1986) (internal citations omitted).

As opposed to containing only a description of general categories of property, the warrant in this case incorporated itemized lists with descriptions, the vast majority of which were very detailed. Moreover, the affidavit the officers had submitted in support of the warrant established probable cause to believe that extremely large quantities of jewelry would be found on the premises. This is not a case in which officers were investigating the theft of a few specific and easily described pieces of jewelry that could have been intermingled with the residents' personal jewelry collection. The affidavit stated that informant White told the affiant he had sold "nearly all" of the property he had stolen in sixteen burglaries to individuals living at the residences to be searched. Finally, for the most part, the descriptions of the items sought were as detailed as they possibly could have been, having been written by the property owners from whom

the items were stolen, making it unlikely that further investigation would have made it possible to describe the items sought with greater particularity. *Cf. Kow*, 58 F.3d at 428 n. 2 (noting that the government's decision to refrain from further investigation and yet rely on the lack of specific information to justify the lack of particularity in the warrant is troubling and that "[t]o the extent that it was difficult for the government to create a more particularized warrant, the government may be to blame").

We hold that the warrant was sufficiently particular and thus valid with respect to the search of the residences for stolen goods. Accordingly, we conclude that insofar as the district court's decision to deny the officers qualified immunity depended on its conclusion that the warrant was unconstitutionally broad or constituted a general warrant, it was in error.

However, we affirm the denial of qualified immunity to appellants who participated in the search of the premises on other grounds. With respect to the search at the principal location, 428 S. Thor, a material dispute of fact exists as to *when* the search began. The parties are in sharp disagreement as to whether officers forcibly entered the 428 S. Thor residence over the occupants' objections and whether they then began searching the residence without the occupants' consent and without being in possession of a warrant. Both parties agree that several officers entered the residence before the warrant was signed by the magistrate at 3:10 p.m. and before the warrant arrived at the premises at approximately 3:30 p.m. How the officers entered the residence is disputed, however. The appellants contend that the plaintiffs consented to the officers' entry and even consented to a

warrantless search of the premises. They further contend that the officers declined to begin searching despite the plaintiffs' consent and waited for the arrival of the warrant before beginning the search. The plaintiffs, however, claim that defendants VanLeuven and Keane forcibly entered 428 S. Thor without the occupants' consent. They also contend that the officers who entered the residence began searching before the warrant arrived or was signed. This dispute as to whether the officers who searched entered the residence lawfully (pursuant either to plaintiffs' consent or some other exception to the warrant requirement) and whether they began searching before the warrant arrived constitutes a dispute of material fact.[35] Because the conduct alleged by plaintiffs would be clearly unlawful and because a material dispute of fact exists, we hold that the appellants who participated in the search of 428 S. Thor are not entitled to summary judgment on the basis of qualified immunity for their conduct related to searching this residence. *Pierce v. Multnomah County*, 76 F.3d at 1038; *Act Up*, 988 F.2d at 872.

As to the search at 802 S. Thor, as noted above plaintiffs have not directed us to evidence in the record which would refute appellants' assertion that James Marks initially consented to the search of his home prior to the arrival of the warrant. However, as we also noted,

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[35] Again, we note that the district court found the issue of whether the officers began searching before the warrant arrive [sic] to be in dispute. It determined, however, that the issue was not *material*, because qualified immunity was being denied on another ground.

the record supports the inference that whatever consent Marks initially gave was withdrawn at some point during the search. Accordingly, when the search began is material here as well; a nonconsensual search could only have been lawful pursuant to a warrant, or some exception to the warrant requirement found not to exist by the district court. Because genuine issues exist regarding when the search began and regarding Marks's consent, the officers who searched the 802 S. Thor premises are not entitled to qualified immunity regarding their participation in the search.[36]

Officers Who "Secured" The Premises

Officers who "secured" the search premises, or detained but did not search the persons present are also not entitled to qualified immunity at this stage of the proceedings because of the dispute over when the search began. *Michigan v. Summers*, 452 U.S. 692, 705, 101 S.Ct. 2587, 2595-96, 69 L.Ed.2d 340 (1981), would in this case, authorize a brief detention of the occupants of the homes for a reasonable period of time "while a proper search [was] conducted." It would not, however, authorize detaining the occupants in furtherance of an illegal search – a search under the circumstances alleged by the plaintiffs. Accordingly, summary judgment on qualified immunity grounds is inappropriate at this time. As a result, we need not consider the district court's alternative theory

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[36] With respect to the searches of both premises, we do not reach the question of the legality of the seizure of any particular items alleged to fall outside the scope of the warrant.

that the length of the detention might have rendered it unreasonable.

Videotaping of Search

We hold that appellant Lavelle, a civilian employee of the Spokane City Police Department, who videotaped portions of the search is also not entitled to qualified immunity at this time, but only because of the factual dispute as to whether the search of the premises was unlawful because it commenced prior to the issuance or arrival of the warrant. Lavelle's videotaping was indisputably performed for legitimate law enforcement purposes.[37] *See Ayeni v. Mottola*, 35 F.3d 680, 684 (2d

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[37] A review of our cases suggests that we have assumed without deciding that videotaping of the execution of a valid search warrant is lawful. *See United States v. Guzman*, 75 F.3d 1090, 1092 (6th Cir.1996) (noting as part of background of case that the execution of a search warrant to search the contents of a bus passenger's bag was videotaped); *United States v. Myers*, 21 F.3d 826, 828 (8th Cir.1994) (noting as part of background of case that law enforcement officials made a videotape of the search of farm on which marijuana was growing, "showing the setup of the farm and the seizure of approximately 393 marijuana plants and a large amount of marijuana-growing equipment"), *cert. denied*, ___ U.S. ___, 115 S.Ct. 742, 130 L.Ed.2d 643 (1995); *United States v. Carpenter*, 933 F.2d 748 (9th Cir.1991) (holding that the district court did not abuse its discretion in admitting into evidence videotape of the execution of a search warrant showing federal agents digging up the bodies of birds buried in pits); *United States v. Willis*, 759 F.2d 1486, 1501 (11th Cir.) (holding that district court did abuse its discretion in allowing the jury to view a silent videotape showing the police executing a search warrant for an airplane thought to contain cocaine), *reh'g denied*, 765 F.2d 154, *cert. denied*, 474 U.S. 849, 106 S.Ct. 144, 88 L.Ed.2d 119 (1985).

Cir.1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1689, 131 L.Ed.2d 554 (1995) (denying qualified immunity to a United States Secret Service agent who allowed a television crew from a weekly news magazine program to videotape the execution of a search warrant authorizing the search of an apartment). However, because material disputes of fact exist as to whether the officers whom Lavelle accompanied began searching without a warrant and because Lavelle could be liable for participating in a search that commenced without a warrant – even if only by videotaping it – we hold that he is not entitled to qualified immunity at this time.

Traffic Stops

The district court denied qualified immunity to defendants Weir, Grub, Bailor and Lindskog for their participation in the two traffic stops which occurred prior to the execution of the warrants, concluding that a genuine issue of material fact existed regarding pretext. Thereafter, the Supreme Court handed down its decision in *Whren v. United States*, ___ U.S. ___, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996), rejecting the argument that "the constitutional reasonableness of traffic stops depends on the actual motivations of the officers involved." *Id.* at ___, 116 S.Ct. at 1774. The Court held that "[a]s a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Id.* at ___, 116 S.Ct. at 1772. The district court in this case found that with respect to each traffic stop appellants alleged probable cause to make the stop at issue and that plaintiffs did not rebut those allegations. Because appellants do not challenge the existence

of probable cause, we reverse the district court's decision denying qualified immunity to the officers involved. Under *Whren*, the officers' conduct does not constitute a Fourth Amendment violation.

We note, however, that in the "Background" section of its January 21, 1994, order granting in part plaintiffs' summary judgment motions, the district court stated that, according to appellants' representation of the facts, after the officers stopped their car, David and Jane Marks and Laura and Chrissie Zeko were "ordered to return to the house where they would await the search warrant." The district court did not address separately the lawfulness of this "order," perhaps considering the issue subsumed in the question of pretext. Appellants' brief asserts that it was appellant Grub who issued the "order." Plaintiffs do not contend otherwise. However, the record contains only the barest of facts regarding the incident. Accordingly, we are unable at this time to evaluate the lawfulness of this apparent seizure, and leave it to the district court to resolve the matter in the first instance. We therefore affirm the part of the order denying qualified immunity to appellant Grub, albeit for different reasons than relied on by the district court.

Seizure of Property for Off-Site Inspection

Finally, we hold that appellants are entitled to qualified immunity for their conduct related to the off-site inspection at the police station of seized property because we conclude that the removal of the goods to the station and their inspection at that location did not violate

clearly established law. As noted above, we take no position on the initial seizure of any particular items.

2. Liability

In reaching our holdings on the appellants' qualified immunity claims, we have rejected some of the reasoning relied on by the district court both in its qualified immunity decisions and its orders granting summary judgment to the plaintiffs on the issue of liability. We have, moreover, come to different conclusions in some instances regarding the availability of qualified immunity to certain appellants. In doing so we necessarily require the reversal of the district court's grant of partial summary judgment to the extent that it conflicts with the approaches or results we have outlined above.

Specifically, we reverse the decision granting summary judgment against those officers who searched the *premises* at 428 S. Thor and 802 S. Thor in light of our conclusion that a genuine issue of material fact exists regarding the time at which the search began and also regarding James Marks's consent. For the same reasons, we also reverse the decision granting summary judgment against appellants who secured the premises by detaining, but not searching, persons who were present when the officers arrived. We affirm summary judgment against those officers who participated in the search of *persons* present at the premises. A judgment in favor of all persons searched is appropriate, except for those persons as to whom probable cause existed. We leave it to the district court to determine initially whether cause existed as to any of the individuals mentioned in the affidavit

other than James Marks – as to him such cause unquestionably exists.

IV. ATTORNEY'S FEES

The plaintiffs seek attorneys' fees and costs under 42 U.S.C. § 1988 for their appeal. A party may be awarded attorney fees as a prevailing party at an interlocutory stage of the proceeding if the party "prevails on the merits as to one or more of his or her claims." *Ward v. County of San Diego,* 791 F.2d 1329 (9th Cir.1986) (citing *Hanrahan v. Hampton,* 446 U.S. 754, 757-58, 100 S.Ct. 1987, 1989-90, 64 L.Ed.2d 670 (1980)). It is not necessary that the party win a judgment that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment: "The fact that the dispute between the parties may continue does not preclude a fee award." *Animal Lovers Volunteer Ass'n, Inc. v. Carlucci,* 867 F.2d 1224 (9th Cir.1989). Plaintiffs here have won more than the mere right to proceed to trial. We affirm the district court's liability decision regarding those officers who searched persons, and certain plaintiffs have, accordingly, conclusively established their entitlement to relief. We have also made other determinations that will require decisions in plaintiffs' favor. We therefore hold that attorneys fees are appropriate in those instances. We remand the question of the amount of fees to the district court.

The plaintiffs also submit that they should be entitled to recover attorneys' fees and costs, under 28 U.S.C. § 1927, on the ground that appellants' appeal on the issue of qualified immunity has unreasonably and vexatiously

multiplied the proceedings and costs in this case. We disagree and deny that request.

V. CONCLUSION

We conclude that the district court erred in its determination that none of the appellants is entitled to qualified immunity for the search of the residences because they failed to read the signed warrant or otherwise inquire into the warrant's scope, or, if they did read it, failed to refer to it during the search. We also reject its conclusion that the warrant was overbroad because it failed to designate with sufficient specificity the items to be seized. However, we hold that the officers and the video technician who participated in the search of the premises, as well as those officers who secured the premises, are not entitled to qualified immunity at this stage of the proceedings because a material dispute of fact exists as to whether the search began before or after the warrant arrived and as to whether the search at 802 S. Thor was consensual. We also hold that those officers who conducted searches of persons present at the premises are not entitled to qualified immunity because the provision of the warrant which authorized the searches of all persons was contrary to established law as any reasonable officer should have known.

We affirm the district court's denial of qualified immunity to the appellants who participated in obtaining the warrant, on different grounds than those on which the district court relied. We conclude contrary to the decision of the district court that those officers could not reasonably rely on the approval of an attorney and a

magistrate. We hold instead that the officers who were involved in obtaining the warrant are not entitled to immunity for obtaining a warrant that authorized the search of all persons present on the premises. We also hold that those officers are not entitled to qualified immunity for participating in the search of the persons who were present at the premises and that they are not entitled to immunity for instructing others to do so.

Finally, we reverse the decision denying immunity to those officers who participated in the traffic stops, in light of the Supreme Court's decision in *Whren v. United States*, although we affirm for the present the denial as to the officer who ordered the occupants of a vehicle to return to 428 S. Thor.

In reaching these conclusions we necessarily reach some of the district court's decisions on liability. We reverse the district court's liability judgment in favor of plaintiffs to the extent that it is based on the conclusion that the officers acted pursuant to a warrant that was invalid with respect to the searching or securing of the premises. Conversely, we affirm the judgment insofar as it holds liable those who conducted searches of persons other than persons as to whom the affidavit in support of the warrant established probable cause.

There still remain for resolution a number of factual issues as to which officers did what to whom and under what circumstances. These matters cannot be resolved on this record on interlocutory appeal. We leave them to further proceedings in the district court.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JAMES SENATOR MARKS, II, et al., Plaintiffs, vs. CITY OF SPOKANE, et al., Defendants.	No. C-89-423-AAM No. C-89-425-AAM **ORDER** (Filed Oct. 21, 1993)
GYPSY CHURCH OF THE NORTHWEST, et al., Plaintiffs, vs. SPOKANE COUNTY, et al., Defendants.	

This matter comes before the court on the following motions: plaintiffs' motion for reconsideration of Judge McNichols' order denying plaintiffs' motion for summary judgment against the individual defendants (Ct. Rec. 154, 305); defendants' third motion for reconsideration of Judge McNichols' order which, through the application of the collateral estoppel doctrine, adopted the state court's finding that the plaintiffs' Constitutional rights were violated (Ct. Rec. 251, 429); and defendants' motions for summary judgment (Ct. Rec. 259, 437, 451). The motions were heard with oral argument on August 12, 1993, in Yakima, Washington. Terry E. Thomson, Mark D. Deife and Gregg R. Smith represent the plaintiffs in Cause No.

C-89-425-AAM. Jeffry K. Finer and Patrick Stiley represent the plaintiffs in Cause No. C-89-423-AAM. Jerry R. Neal, John Nelson and Lori A. Terry represent Spokane County, Sheriff Larry Erickson, and Rick Grabenstein. James C. Sloane, Rocco N. Treppiedi, and Jeanie J. Mohler represent the City of Spokane and the remaining defendants.

FACTUAL BACKGROUND

In late spring of 1986, Spokane County Detective Rick Grabenstein arrested Mike White, a suspect linked to seventeen burglaries in Spokane County. White confessed to selling large quantities of stolen property to members of the Marks family at three locations within the city limits: the residence of Grover Marks at 428 S. Thor, the residence of James Senator Marks II (hereinafter James Marks) at 802 S. Thor, and a used car business located near the two residences. Detective Grabenstein relayed this information to members of the City/County Burglary Task Force[1] who had previously received reports that members of the Marks family were involved in a "fencing" operation. The Task Force decided to use White as a "cooperating individual" to gather additional evidence establishing the Marks' involvement in the purchase of

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[1] In 1985, the Spokane Police Department set up a Burglary Task Force within its Investigative Division to combat a growing epidemic of residential burglaries which plagued the Spokane community. By design, the Task Force worked closely with the Spokane County Prosecuting Attorney's Office, particularly with Deputy Prosecuting Attorney Patricia Thompson.

stolen property. Since Detective Grabenstein had established a good working rapport with White, the County temporarily assigned him to the Task Force to assist in the investigation of the alleged fencing operation.[2]

White made several attempts between June 10 and June 17, 1986, to effectuate undercover sales of stolen property to the residents at 428 S. Thor and 802 S. Thor. Three of the sales were successful. On June 10, 1986, White sold several items of purportedly stolen jewelry to James Marks at the 802 S. Thor address. On June 12, 1986, White completed a second controlled sale of stolen goods to James Marks at 802 S. Thor. This second transaction was recorded on audio and video tape pursuant to court order. On June 17, 1986, White sold purportedly stolen jewelry and silverware to plaintiff Lippie Marks at the residence located at 428 S. Thor. That purchase was also recorded on audio and video tape pursuant to court order.

On June 18, 1986, at approximately 11:00 a.m., White attempted another sale at 802 S. Thor, but was refused by plaintiff Jane Marks. Believing the refusal to have resulted from a compromise of the investigation and fearing the destruction or disappearance of evidence, the Task Force immediately sought to obtain search warrants for the residences. This decision was approved by Lt.

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[2] The County asserts that during the short period of time that Grabenstein was working with the Task Force, he was under the supervision of the Spokane Police Department, not the County Sheriff's Office. However, other than the conclusory statements made by Grabenstein and Sheriff Erickson, the County has produced no evidence to support this assertion.

Larry Freeman who was in charge of the Task Force and Captain Robert Allen, the Captain of the Investigative Division. Capt. Allen authorized the use of detectives from other units in the Investigative Division, and also obtained permission from the Chief's Office to recruit additional personnel from other divisions in the police department.

Detective Grabenstein and City Detectives Sheldon Reeve and Jack Neumiller were directed to prepare a search warrant. At approximately 11:20 a.m., the trio went to the public safety building to prepare the affidavit and search warrant. The officers compiled a list describing the property which White had sold to plaintiffs James and Lippie Marks on June 10, 12 and 17, 1986. At the suggestion of Detective Neumiller, the officers also attached to the affidavit and warrant more than 40 pages of stolen property reports which were prepared by the actual property owners who were allegedly victimized by White. The inclusion of these reports was based on White's statement that he and his accomplices had sold some of the stolen items listed in the reports to members of the Marks family. However, this connection between the stolen property reports and the two residences sought to be searched was not reduced to writing in the application for the search warrant.[3]

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[3] The inclusion of stolen property reports in an affidavit of probable cause was not a practice taught by the police department, but was a standard practice used by Det. Neumiller and other officers in the department. The defendants contend that it is an accepted practice among the Spokane County judiciary to accept the property lists contained in police reports of residential burglaries as part of an affidavit of probable cause

The affidavit and warrant were taken to Deputy Prosecuting Attorney Patricia Thompson for review and approval, as required by departmental policy. Once approved, Grabenstein presented the affidavit and warrant to Spokane County District Court Judge Raymond Tanksley. Judge Tanksley reviewed the affidavit and warrant, asked Grabenstein questions, including a specific question about the stolen property lists, and signed two copies of the warrant. This occurred at approximately 3:00 p.m. Immediately upon the signing of the warrants, Grabenstein and Reeves drove to the 428 S. Thor residence. Grabenstein got out of the vehicle and Reeves continued on to the 802 S. Thor residence.

While the search warrant affidavit was being prepared, the police conducted a general briefing for those who had been recruited to assist in the search. During the noon-hour briefing, Neumiller described the basic property that would be sought in the searches. Since the warrants were not yet completed or signed, the officers were informed that the warrants would be "generally" seeking any items commonly stolen in residential burglaries, consisting mostly of jewelry, silverware, electronic equipment and photography equipment. Following the

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or search warrant for stolen property. According to the defendants, the district court judges recognize the fact that officers will be looking for the additional items that are attached to the search warrant. While there is some evidence in the record indicating that this may have been the understanding of the judge who issued the warrant, the suppression and dismissal ruling of the reviewing judge suggests that the practice does not always, in the eyes of the County judiciary, pass constitutional muster.

briefing session, which lasted approximately 30 minutes, the officers were dispatched to a staging area near the two homes where they were to await the delivery of the warrants.

According to the defendants' representation of the facts, officers began arriving at the residences at approximately 1:00 p.m. Sometime near 2:00 p.m., surveillance crews observed James Marks drive up to his residence at 802 S. Thor, enter the house and come back out with a box that he placed in the trunk of his car. Marks then got in the car and drove away. About this same time, surveillance crews observed a car with several individuals leave Grover Marks' residence at 428 S. Thor. Concerned that evidence was being removed from the houses, Lieutenant VanLeuven telephoned Deputy Prosecuting Attorney Patricia Thompson who informed him that the officers could either seek consent from the residents to enter the homes and await the arrival of the warrants, or they could secure the premises from the outside to prevent any ingress or egress.

The officers made pretextual traffic stops on each of the cars seen leaving the residences. The officers who stopped James Marks advised him of his constitutional rights and, after receiving Marks' consent, conducted a search of his vehicle. The consent form indicates that Marks signed the form at 2:00 p.m. After the search was completed, Marks returned to his home with the officers.

When the second vehicle was stopped, the officers asked the occupants to identify themselves and then ordered them to return to the 428 S. Thor residence to await the arrival of the search warrant. While defendants

maintain that the stop of the second vehicle occurred shortly after 2:00 p.m., plaintiffs contend that the stop occurred sometime around 9:30 a.m.

Upon his return to the 802 S. Thor residence, James Marks was informed that the police were in the process of obtaining a search warrant to look for stolen property. Neumiller advised Marks of his constitutional rights at 2:52 p.m. and Marks signed the rights card, indicating he wanted to talk to his attorney. The defendants state that Marks telephoned his attorney, Robert McGoldrick, and then informed the officers that they were welcome to search the house.[4] Neumiller declined the invitation, and told Marks they would wait for the arrival of the warrant. Three officers waited inside the residence while several others remained outside to establish a security perimeter. Defendants claim that upon the officers' arrival at James Marks' residence at 802 S. Thor, Detective Reeves gave the warrant to Neumiller who in turn gave it to James Marks. Near the beginning of the search, James Marks allegedly walked over to a china hutch, grabbed some items out of a bowl, threw them down on a table, and stated, "These are the items that your blond hair boy sold to us, because he needed gas money. I gave him some

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[4] Marks' attorney came to the 802 S. Thor residence later that afternoon when the search was in progress. According to the defendants, Mr. McGoldrick reviewed the warrant and advised James Marks that he should allow the search. According to the plaintiffs, Mr. McGoldrick asked to see the warrant but was advised that the warrant was at Grover's house and he would have to go there to read it. When Mr. McGoldrick went to Grover's house, the officers refused to let him enter the house or read the warrant.

money for them." Neumiller recognized the items as those given to White for the undercover sale. The search continued and the officers found some more jewelry in a safe located in the bathroom. Neumiller states in his affidavit that he asked James Marks whether there were any cameras or photographic equipment in the house (this question was posed to Mr. Marks after he had asked to speak to his attorney) and Marks responded that there were not. The officers then found numerous pieces of photography equipment, including cameras, lenses, flash units, etc. Some but not all of the equipment matched the general descriptions of equipment referred to in the warrant.

Grabenstein states by affidavit that he arrived at the 428 S. Thor at approximately 3:30 p.m. and delivered a copy of the signed search warrant to Grover Marks. Grover Marks asked Grabenstein to read him the warrant, but Grabenstein refused because he was too busy. Grabenstein told Grover that he could find someone else to read it to him. Grabenstein read Grover Marks his *Miranda* rights and obtained Mr. Mark's [sic] signature on the rights card at 3:40 p.m.

Because the warrant authorized the search for jewelry and silverware, the officers searched in all places in which such items could be secreted. During the course of the search, all individuals present at the 428 S. Thor residence were searched, even those who were just visiting. All jewelry and money worn or possessed by the individuals was removed for subsequent seizure. The officers collected numerous items not listed on the warrant based on the plain view doctrine, having determined that the house contained an enormous amount of such

items, far beyond the amount one might ordinarily expect to find as personal property.

A metal box containing more than $20,000 and some jewelry was found in a bedroom at 428 S. Thor. Not knowing at that time that additional amounts of money would also be found, the officers merely filmed the box and its contents and returned it to the closet from which it had been retrieved. This box subsequently disappeared.

A footlocker and several cans of money were also found under a false floor. In total, approximately $1.6 million was discovered at the 428 S. Thor residence.

During the course of the search, the officers made several calls to Lieutenant Freeman who remained back at the police station, seeking advice on what to do with the cash. Initially, Freeman advised them not to seize the cash as it was not included in the warrant and it was not clear whether it could be linked to any illegal activity. As additional amounts were discovered, Freeman telephoned Captain Allen who suggested that the officers contact Deputy Prosecutor Patricia Thompson and Assistant United States Attorney James Crum for legal advice regarding the seizure of the cash. Thompson told the officers that they need not attempt to amend the warrant or seek another warrant, even though the original warrant did not mention cash, because the cash was seized pursuant to the plain view doctrine. AUSA Crum advised the officers to hold the cash for IRS seizure.

Captain Allen ordered the property moved to the Public Safety Building where the search was to be completed. When the officers arrived at the Police Station at approximately 8:00 p.m., Grabenstein prepared a search

warrant return and inventory. The inventory process was completed around 1:00 a.m. on June 19, 1986. The property sheets prepared by each of the seizing officers were copied and attached to the standard search warrant return which was given to Grover Marks.

On June 23, 1986, the IRS served a series of liens or notices of seizure on the City of Spokane for the cash that had been seized from Grover's residence. Also on that day, the City was served with a certified copy of a Writ of Garnishment in the amount of $42,864.89 from Spokane County Superior Court File No. 80-2-02048-4. The cash, excluding $43,000 for the garnishments, was turned over to the IRS. The $43,000 was deposited in a separate bank account.

On June 20, 1986, the Marks filed a motion for return of the cash that was seized from Grover Marks' residence, and asked for an expedited hearing on the matter. Over the County Prosecutor's objection, an expedited hearing was conducted on June 23, 1986, before Judge Tanksley, the judge who issued the warrant. Judge Tanksley denied the County's motion for permission to present oral testimony or written affidavits of the officers who participated in the search, on the basis that such testimony could not affect or alter the court's ruling regarding the illegality of the officers' actions in seizing the cash.[5] Judge Tanksley ruled that the cash was outside the scope of the warrant and that the plain view exception did not apply because, although the officers were legally present

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[5] The legality of the officers' conduct with respect to the other items seized was not in question at that time.

and the cash was inadvertently discovered, the cash was not immediately identifiable as evidence of a crime. Defendants' Joint LR 56 Statement, Ex. 58, p. 7-8. The Judge then granted the Marks' motion for return of the property, subject to the IRS notice of seizure and the writ of garnishment.

In December 1986, the State of Washington brought a criminal action against James Senator Marks, II, Jane Marks, Grover Marks and Marie "Lippie" Marks, charging them with trafficking in stolen goods. In November 1987, Judge Murphy conducted a hearing on the Marks' motion for return of the seized property and ordered the State to return to the defendants all property that had not been identified as stolen through public viewings. The items that had been identified as stolen remained subject to further proceedings in the court.

In May 1988, the Marks moved to dismiss the criminal charges against them and/or to suppress evidence seized during the June 18, 1986 search. After a lengthy evidentiary hearing which was held in June 1988, Spokane Superior Court Judge John A. Schultheis granted the motion and dismissed the action. Judge Schultheis found it impossible to determine, from reading the property lists attached to the search warrant, either their relevance to or connection with the property to be seized from the residences. He found no reference to the property lists in the search warrant, nor any allegation that identified the defendants as possible suspects in the thefts or burglaries, nor any suggestion that any of these items might have been sold to or by any of the defendants.

Judge Schultheis also found: that there was strong evidence indicating that the search may have begun prior to Judge Tanksley's signing of the warrant at 3:10 p.m.;[6] that Grabenstein refused to read Grover Marks the warrant even though Marks stated that he could not read it himself; that the officers refused to allow the Marks' attorney to read the warrant or to confer with his clients; that none of the officers conducting the search (other than Grabenstein) saw a copy of the search warrant either prior to or during the search; that the warrants lacked particularization to such an extent that the officers had no guidelines from which to determine what could or should be seized, thereby giving complete discretion to the individual officers conducting the search; that the officers

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[6] In his Findings of Facts, Judge Schultheis states:

> Although the search warrants were not delivered to the respective homes until approximately 3:30 p.m., and were not signed by Judge Tanksley until approximately 3:10 p.m., a watch is shown in the police videotape made at South 428 Thor. This watch had been removed from the wrist of Grover Marks. The time on the watch shows 1:07. It is very evident from the videotape that the watch is operating. In addition, an ambulance was called, as well as a Paramedic Squad truck, to the area of the Markses' [sic] residences at 2:56 p.m. on June 18, 1986. The ambulance and paramedic units were called to the scene because of apparent fainting and other physical problems experienced by some of the occupants at South 428 Thor during the course of the search. At the hearing, Sgt. Ennis testified that they were called at his order and at his direction after the discovery of the money; this was when the physical problems and disturbances began, and this occurred when the search was nearly completed.

conducted a general search of the homes as well as of the persons who were present at the residences; and that no inventory of or receipt for any property or money seized was left with the residents at either address. Based on these findings, Judge Schultheis concluded that the searches were violative of the Fourth and Sixth Amendments of the United States Constitution; Article I, Sec. 7 of the Washington State Constitution; and Washington State criminal laws.[7]

The plaintiffs instituted the present Civil Rights actions in June 1989. On March 30, 1991, Judge McNichols entered an order precluding the defendants from relying on the plain view doctrine to justify the seizure of cash and property not specifically identified in the warrant, because the first element of the doctrine – a lawful initial intrusion – was absent. The Judge premised his ruling on the state court's determination that the warrant and resulting searches and seizures were illegal. Judge McNichols expressly adopted the state court ruling through the application of collateral estoppel.

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[7] The State appealed the district court's dismissal of the action and its order directing the return of the money, but did not appeal the court's ruling on the suppression issue. The Washington Supreme Court reversed the trial court's order of dismissal, reinstated the criminal charges against the defendants and remanded the matter to the trial court for an evidentiary hearing.

DISCUSSION

I. COLLATERAL ESTOPPEL

In June 1991, the plaintiffs moved this court for an order precluding relitigation of the constitutional issues previously adjudicated and resolved in the state court criminal proceedings. The plaintiffs' motion was directed solely against the County and City of Spokane as they were the real parties in interest in the criminal proceedings and were therefore in privity with the State of Washington, the nominal plaintiff in that action. By order dated September 11, 1991, Judge Robert J. McNichols concluded that the illegality of the search under the Fourth and Fourteenth Amendments had been fully litigated and resolved in the state court and that the doctrine of collateral estoppel would be applied to prevent relitigation of that narrow issue in the civil rights action.[8] It is apparent from the language of the order that Judge McNichols intended to apply the doctrine against the individual defendants as well as the County and the City.

On November 7, 1991, Judge McNichols summarily denied the defendants' motion for reconsideration of the order regarding the application of the doctrine of collateral estoppel. A second motion for reconsideration was likewise denied on March 13, 1992. In denying the second motion, Judge McNichols noted that the state trial court, after conducting a lengthy evidentiary hearing, determined that the search warrant was overbroad and insufficiently specific and that the defendant officers operated

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[8] The court reserved ruling on the applicability of the collateral estoppel doctrine to the alleged violation of plaintiffs' Sixth Amendment rights.

with complete discretion in executing a general search of the plaintiffs' homes. To refuse application of the collateral estoppel doctrine under these circumstances would, in the opinion of Judge McNichols, "essentially prevent any state criminal trial findings, no matter how clear, from being used as the basis for offensive collateral estoppel in a subsequent civil action."

Defendants have filed a third motion for reconsideration of the September 11, 1991 order regarding the application of collateral estoppel. Defendants claim that Judge McNichols' erred in two respects: first, by determining that the defendants were in privity with the State in the criminal proceeding, and second, by concluding that the application of collateral estoppel will not work an injustice against the defendants.

The starting point for the reconsideration of prior decisions by a federal district court is Rule 54(b) of the Federal Rules of Civil Procedure. Rule 54(b) provides that absent an express entry of a final judgment, all orders of a district court are "subject to reopening at the discretion of the district judge." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 12 (1983). The district court's discretion, however, may be properly exercised only within the confines of the "Law of the Case" doctrine. This judicially created doctrine is a rule of practice which, "[a]s most commonly defined, . . . posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 815-16 (1988) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)).

The doctrine promotes the principles of finality and judicial economy by protecting against the relitigation or reconsideration of settled issues. *Christianson*, 486 U.S. at 816. The doctrine encompasses a court's explicit decisions as well as those issues decided by necessary implication. *Milgard Tempering, Inc. v. Selas Corp. of America*, 902 F.2d 703, 715 (9th Cir. 1990); *Eichman v. Fotomat Corp.*, 880 F.2d 149, 157 (9th Cir. 1989).

The Ninth Circuit rigidly adheres to the law of the case doctrine and has held that a district court may reconsider an issue previously decided in only three instances: (1) where the first decision was clearly erroneous and would result in manifest injustice; (2) where there has been an intervening change in the controlling law; or (3) where the evidence in a subsequent proceeding is substantially different. *Milgard*, 902 F.2d at 715. Before exercising its discretion to reconsider a prior ruling, the district court should consider the stage of the proceeding in which reconsideration is sought and the nature of the issues involved. 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4478 (1981).

The Supreme Court has held that the doctrine of collateral estoppel may be applied offensively in a § 1983 case to preclude relitigation of a federal constitutional issue decided in state criminal proceedings. "[N]othing in the language of § 1983 remotely expresses any congressional intent to contravene the common-law rules of preclusion or to repeal the express statutory requirements of the predecessor of 28 U.S.C. § 1738. . . . " *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 82 (1984) (quoting *Allen v. McCurry*, 449 U.S. 90, 97-98 (1980)). However,

collateral estoppel cannot be invoked against a party who did not have a full and fair opportunity to litigate the issue in the earlier case. *Allen*, 449 U.S. at 95.

Under 28 U.S.C. § 1738, a federal court must give a state court judgment the same preclusive effect it would be given under the law of the state in which the judgment was rendered. *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984). Thus, this court must first determine whether Washington rules of collateral estoppel would bar relitigation of the plaintiffs' Fourth Amendment claims in a subsequent civil proceeding. Collateral estoppel can be invoked under Washington law only if the issues in the two actions are identical, there was a final judgment on the merits in the first action, the party against whom the plea is asserted was a party to or in privity with a party to the prior adjudication, and application of the doctrine does not work an injustice on the party against whom it is to be applied. *Maland v. Retirement Systems*, 103 Wn.2d 484, 489, 694 P.2d 16 (1985); *Rains v. State*, 100 Wn.2d 660, 665, 674 P.2d 165 (1984).

While the state, county and city are distinct legal entities, their interests in the criminal prosecutions were sufficiently similar to invoke the doctrine of collateral estoppel.[9] In contrast, the individual officers were neither parties to the criminal proceedings nor privies of parties. "[P]rivity does not exist merely because a person 'happen[s] to be interested in the same question, or in proving

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[9] The court shall not elaborate on this point. Suffice it to say that, with respect to the County and the City, the undersigned agrees with the reasoning set forth by Judge McNichols in his September 11, 1991 order.

or disproving the same state of facts.' " *Duncan v. Clements*, 744 F.2d 48, 52 (8th Cir. 1984).

> Privity within the meaning of the doctrine of issue preclusion is privity as it exists in relation to an identity of interest in the subject matter of the litigation. The interest of the State of Missouri in a criminal proceeding are not identical to those of an individual officer such as Schaeffer. In a different context, the Supreme Court noted: "[T]he purpose of a criminal court is not to provide a forum for the ascertainment of private rights. Rather it is to vindicate the public interest in the enforcement of the criminal law while at the same time safeguarding the rights of the individual defendant."

Id. at 52 (quoting *United States v. Standefer*, 447 U.S. 10, 25 (1980).

The interests of the individual defendants were not adequately protected or represented in the prior adjudication brought by the State. While the officers may have been witnesses in the state proceedings, they had no direct individual personal interest in the outcome of the criminal case. The State was interested solely in obtaining a conviction. Since the prosecutor believed she could succeed in this goal without using the suppressed evidence, she chose not to appeal the suppression ruling. The prosecutor states in her affidavit that she gave no consideration whatsoever to the officers' potential liability in a subsequent § 1983 action when she opposed the suppression motion or when she determined not to appeal the court's ruling on that issue.

Moreover, it cannot be said that the individual defendants had a full and fair opportunity to contest factual issues concerning their roles in the search. The officers were not directly employed by the state and had no measure of control over the criminal proceeding or the decision to appeal. To apply collateral estoppel offensively under these facts would work a great injustice as it would essentially deny the individual defendants an opportunity to present a defense. *See, Davis v. Eide,* 439 F.2d 1077 (9th Cir. 1971) (city police officers, not directly employed by state and with no measure of control over criminal proceeding and no direct individual personal interest in its outcome, lack sufficient privity with the state to invoke doctrine of collateral estoppel); *Farley v. North Bergen Township Bd. of Educ.,* 705 F. Supp. 223, 228 (D.N.J. 1989) (improper to invoke offensive collateral estoppel against an official who cannot be said to have had a full and fair opportunity to contest factual issues concerning his role in unconstitutional activity, even though he was strongly implicated in the state proceedings and was a witness in those proceedings).

IT IS HEREBY ORDERED that the defendants' motion for reconsideration is **GRANTED**. That portion of the court's September 11, 1991 order, applying the collateral estoppel doctrine to defendants other than the County and City of Spokane, is **VACATED.** Only the County and City will be estopped from relitigating the constitutionality of the June 18, 1986 search and seizure.

The court notes that the plaintiffs, apparently relying on Judge McNichols' previous rulings on collateral estoppel, have not moved for summary judgment against the

individual defendants with respect to the underlying constitutional violations. Because this issue may be amenable to resolution on summary judgment, the court grants plaintiffs leave to file a motion for summary judgment, limited to the sole issue of whether the individual defendants' actions deprived the plaintiffs of their constitutional rights. The motion shall be filed on or before November 8, 1993. Defendants' response must be filed no later than November 22, 1993. Plaintiffs' reply, if any, shall be filed on or before December 3, 1993. The motion shall be heard without oral argument on December 17, 1993.

II. QUALIFIED IMMUNITY

On March 13, 1992, Judge McNichols denied plaintiffs' motion for summary judgment on the remaining issues of liability under 42 U.S.C. § 1983.[10] The plaintiffs subsequently moved the court to reconsider its decision, to the extent summary judgment was denied against the individual officers who participated in the June 18, 1986 search. The plaintiffs set forth two grounds in support of their motion for reconsideration: (1) the court's ruling rested on a Ninth Circuit case which was overruled by the United States Supreme Court in *Hunter v. Bryant*, ___ U.S. ___, 112 S. Ct. 534, 116 L.Ed.2d 589 (1991), and (2) the

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[10] As stated above, because Judge McNichols had previously ruled that the defendants would be collaterally estopped from denying the illegality of the search, the plaintiffs' summary judgment motion centered on the officers' immunity from suit rather than the validity of the warrant or of the search conducted pursuant thereto.

officers cannot, as a matter of law, rely on good faith immunity defense where they acted pursuant to a facially deficient warrant and conducted a general search.

Plaintiffs argue that the court, by overlooking the teachings of *Hunter v. Bryant* and its progeny, erroneously concluded that the qualified immunity issue was one of fact to be determined by a jury. The Supreme Court in *Hunter* made it clear that the applicability of a good faith immunity defense is a question of law which trial courts should usually resolve on motions for summary judgment prior to trial. Defendants agree that the material facts relevant to the qualified immunity defense are undisputed and that the issue should be decided as a matter of law. Because the order denying plaintiffs' motion makes no reference to *Hunter*, the court shall reconsider the motion in light of the test set forth in that case.

Officers are entitled to qualified immunity from suit if, in light of the clearly established law at the time, a reasonable official could have believed his conduct was lawful. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Hemphill v. Kincheloe*, 987 F.2d 589, 591 (9th Cir. 1993). A two-step analysis must be undertaken to determine whether this standard is satisfied. The court must ask: 1) "Was the law governing the official's conduct clearly established?" and 2) "Under that law, could a reasonable officer have believed the conduct was lawful?" *Hemphill*, 987 F.2d at 592 (quoting *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993)). This analysis must be employed at the earliest possible stage of litigation. *Hunter v. Bryant*, 112 S.Ct. at 536.

"If a reasonable official could have believed that his actions were lawful, summary judgment on the basis of qualified immunity is appropriate." *Hemphill*, 987 F.2d at 593. The court need not decide the constitutionality of the officers' conduct, if it finds that they reasonably believed the searches were constitutional. *Act Up!/Portland*, 988 F.2d at 872-73. On the other hand, summary judgment for the plaintiffs may be appropriate if the court determines that, even construing the facts in defendants' favor, the officers could not have reasonably believed their conduct was lawful. 988 F.2d at 873 ("if the facts alleged by the defendant officer could not support a reasonable belief that his conduct was lawful, he is not entitled to qualified immunity").

It is said that the qualified immunity doctrine " 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.' " *Hunter*, 112 S.Ct. at 537 (quoting *Malley v. Briggs*, 475 U.S. 335, 343, 341 (1986)). The doctrine allows for reasonable error because "officials should not err always on the side of caution" merely to avoid being sued. *Hunter*, 112 S.Ct. at 537.

Qualified immunity attaches to an officer who conducts a search pursuant to and within the scope of a validly issued warrant, but only if the officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant is objectively reasonable. *United States v. Leon*, 468 U.S. 897 (1984).

> It is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the

> Fourth Amendment. In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient. "[O]nce the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law." Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.

United States v. Leon, 468 U.S. 897, 920-21 (1984). The immunity vanishes, however, if the search warrant affidavit is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable or if the warrant is so facially deficient in particularizing the place to be searched or the items to be seized that the executing officers cannot reasonably presume it to be valid. *Id.* at 923. The officers bear the burden of proving that their reliance on the warrant was objectively reasonable. *United States v. Michaelian*, 803 F.2d at 1042, 1048 (9th Cir. 1986).

According to the plaintiffs, neither the warrant nor the pre-search instructions gave the executing officers objective standard that would permit them to differentiate between the property lawfully subject to seizure and the legitimate property possessed by the individual plaintiffs found in the homes. Because no reasonably prudent, well-trained officer should have relied upon the June 18, 1986 general warrant or upon instructions from supervisors to engage in a general search, plaintiffs urge the court to find that all officers who participated in the illegal general search are stripped of any good faith immunity defense as a matter of law.

> "[I]n the context of Fourth Amendment violations there can be no inquiry as to a police officer's subjective intent or belief. Rather, only an officer's 'objective good faith – that is, whether he could reasonably have believed that [his conduct] did not violate the Fourth Amendment – may be relevant to the availability of the qualified immunity defense to monetary liability under § 1983.' "

Morgan v. Woessner, 975 F.2d 629 (9th Cir. 1992).

The law is clearly established that warrants must particularly describe the things to be seized and that the executing officers must confine their activities to the precise scope of the warrant. *Guerra v. Sutton*, 783 F.2d 1371, 1375 n.4 (9th Cir. 1986). An officer who conducts a search or makes an arrest without knowledge of the details of the warrant under which he or she presumes to act violates clearly established law. *Id.* at 1375. This is not to say that all or even any of the officers must actually *see* the warrant, as law enforcement officers are entitled to rely on one another to a certain extent. *Guerra v. Sutton*, 783 F.2d 1371, 1375 (9th Cir. 1986). However, the mere existence of a warrant will not insulate officers from liability for unconstitutional searches or seizures, if they fail to inquire as to the warrant's nature and scope. *Id.* at 1375.

In *Guerra*, the chief of police of Zillah, Washington called a local INS supervisor and reported that illegal aliens were living in certain houses in the Leland Street neighborhood of Zillah. The police chief requested assistance from the INS to "back up" the understaffed local police department during an investigation of the residences. The police chief assured the supervisor that he

would obtain an appropriate warrant. An INS superior agreed to allow ten INS investigators to assist in the investigation, provided the local police had warrants. The next day, the local police officers and the INS agents searched three homes in the Leland neighborhood and arrested a number of individuals. Neither the INS nor the local police had obtained a warrant for the searches, nor had they made any attempt to obtain a warrant. None of the INS agents saw or asked to see a warrant.

The individuals who had been detained or arrested during the search brought a § 1983 claim against the police officers and a parallel *Bivens* claim against the ten INS agents. The district court dismissed the claims against the INS agents, finding they were immune from suit due to their reliance on the police chief's assurances that the necessary paperwork was being done to obtain appropriate warrants. The Ninth Circuit vacated the dismissal after concluding that the agents were not entitled to invoke the qualified immunity defense. Although the Circuit Court agreed that the INS defendants reasonably relied on the representation of a responsible person that a proper warrant would be obtained, it found that the agents were stripped of their immunity because they failed to inquire as to the nature and scope of the warrant (which in fact was not obtained) and were not given an advance briefing as to the source and extent of their authority to enter, search, and arrest.

> We are not willing to extend qualified immunity to the conduct of INS agents acting under the assumed authority of a warrant where such agents have not made inquiry as to the nature and scope of that warrant. An INS agent who

> conducts a search or makes an arrest without knowledge of the details of the warrant under which he presumes to act violates clearly established law.

Guerra, 783 F.2d at 1375. The circuit court remanded the case to the district court to determine whether an illegal arrest occurred when the homes were surrounded or when the individual plaintiffs were interrogated. In so doing, the Ninth Circuit made it clear that the absence of immunity did not foreclose the possibility that the agents' actions were constitutional. *Id.* at 1375 ("It is possible, as the comments of the district court suggest, that the acts of the INS defendants were not 4th Amendment violations at all and hence are not affected by the defendants' lack of immunity. . . . ").

The facts in the case at bar are similar to those found in *Guerra*. Officers were solicited to help other officers execute warrants that were in the process of being obtained. While the present case differs in that a warrant actually issued and a pre-briefing session was held, the end result is the same: the officers conducted the search without inquiring as to the scope and nature of the warrant *after it had been issued*. The evidence presented by the defendants establishes that the officers who conducted the noon-hour briefing advised those in attendance that they had not seen the warrants or the affidavit of probable cause but that the warrants would essentially seek all items which could have been stolen during the course of a burglary, including jewelry, photography equipment and silverware. In light of the existing law regarding the particularity of descriptions in warrants, the officers'

reliance on pre-issuance statements essentially authorizing a general search of the premises and all occupants therein is not objectively reasonable. That the officers were acting pursuant to directions or instructions does not provide a basis for broader immunity.

The undisputed facts establish that defendants Grabenstein and Reeve were the only officers with knowledge of the contents of the search warrants. The remaining officers neither knew nor inquired as to the scope of the warrants. As a matter of law, the qualified immunity defense is unavailable to all defendant officers other than Grabenstein and Reeves. For this reason,

IT IS ORDERED that the plaintiffs' motion for reconsideration of the order denying summary judgment on the qualified immunity issue is **GRANTED**, to the extent discussed above.[11]

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[11] Should summary judgment be granted against defendants Grabenstein and Reeves following the hearing scheduled for December 17, 1993, the court will at that time revisit the immunity issue as it relates to those officers. *See, United States v. Michaelian,* 803 F.2d 1042 (9th Cir. 1986) (good faith exception does not extend to situations in which the officer obtains a warrant based on a "bare bones" affidavit and then relies on good faith execution by innocent colleagues); *United States v. Stubbs,* 873 F.2d 210 (9th Cir. 1989) (executing officers cannot reasonably presume facially defective warrant to be valid). No further briefing on the immunity issue will be required or permitted, as the court has been fully informed of the parties' positions by the submissions currently under review.

III. SUMMARY JUDGMENT

The defendants move for summary judgment on four grounds: 1) the plaintiffs cannot establish liability for the constitutional torts alleged against the individual defendants because they are immune from suit;[12] 2) the plaintiffs' alleged injury was not caused by a custom, policy, or practice of the County or the City; and 3) there is no evidence that the defendants' actions were motivated by racial animus. A court will grant summary judgment to the moving party only "if the pleadings, depositions, answers to interrogatories, and admissions of [sic] file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

A. Custom, Policy or Practice

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

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[12] The court will not address defendants' qualified immunity argument, as the issue was fully discussed in the preceding section in the context of plaintiffs' motion for reconsideration.

Municipalities are "persons" subject to liability under section 1983 where "action pursuant to official municipal policy of some nature cause[s] a constitutional tort." *Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978). Municipal liability can be established in one of three ways: (1) the plaintiff may prove that a municipal employee committed the alleged constitutional violation pursuant to a formal governmental policy or a longstanding practice or custom which constitutes the standard operating procedure of the local governmental entity; (2) the plaintiff may establish that the individual who committed the constitutional tort was an official with final policy-making authority and that the challenged action itself thus constituted an act of official governmental policy, or (3) the plaintiff may prove that an official with final policy-making authority ratified a subordinate's unconstitutional decision or action and the basis for it. *Gillette v. Delmore*, 979 F.2d 1342, 1346-47 (9th Cir. 1992).

A municipality may not be held vicariously liable for the unconstitutional acts of its employees under the theory of **respondeat superior**. *Id.; Gillette v. Delmore*, 979 F.2d 1342, 1346 (9th Cir. 1992). Nor can liability be imposed upon proof of a single incident of unconstitutional activity, "***unless*** proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker." *Oklahoma City v. Tuttle*, 105 S.Ct. 2427 (1985). A municipality may be liable under section 1983, however, if it had notice of prior misbehavior by its officers and failed to take remedial steps, thereby demonstrating a deliberate indifference to the offensive acts. *Patzner v. Burkett*, 779 F.2d 1363, 1367 (8th Cir. 1985).

Upon review of the record in its entirety, the court finds numerous genuine issues of material fact precluding summary judgment in favor of the County or the City on the custom, policy, or practice issue. There is evidence in the record suggesting that the Task Force operated under the joint control of the City and County. In his search warrant affidavit, County Detective Grabenstein describes the Task Force as a "City/County combined Burglary/Robbery Task Force." City policy required that all search warrants had to be reviewed and approved by a Spokane County Prosecuting Attorney prior to issuance and execution. The officers consulted the County Prosecutor for legal advice and direction throughout the duration of the search. When the officers sought advice from their superiors in the City Police Department, they were referred to the County Prosecutor. Given the degree of authority and control delegated to the Prosecutor, a reasonable jury could find that the Prosecutor was an official policymaker for the municipalities and her actions were attributable to them.

In addition to the contested facts concerning the identity of the official policymakers for the County and the City, there are legitimate questions of fact concerning the frequency with which the officers evoked the practice of attaching stolen property reports to search warrant affidavits and the acquiescence in or subsequent ratification of the officers' conduct by officials with final policymaking authority.

Viewing the evidence in the light most favorable to the plaintiffs, the court concludes that a reasonable jury could find proof of customs, policies, or practices that

would lead to municipal liability. Therefore, defendants' motion on this ground must be denied.

B. Racial Animus

Plaintiffs allege in their complaints that the County and City of Spokane and the individual law enforcement officers acted with racial animus and discriminatory intent to deprive them of their civil rights in violation of 42 U.S.C. §§ 1981, 1982, 1983, and 1985. Plaintiffs also rights [sic]. The racial animus claims against the municipal defendants were dismissed by order dated May 30, 1990. The defendants now move for summary judgment on the racial animus claims alleged against the individual defendants.

To establish liability for discrimination under sections 1981, 1982, 1983, and 1985, plaintiffs must prove that defendants' conduct was purposefully discriminatory. *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 391 (1982) (§ 1981 reaches only purposeful discrimination); *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987) (§ 1982 is intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics); *Peters v. Lieuallen*, 746 F.2d 1390 (9th Cir. 1984) (discrimination claims under §§ 1981 and 1983 require proof of intentional discrimination on part of the defendant). Class-based animus is also an essential element of a claim under the second clause of § 1985(2) or the first clause of § 1985(3). *Kush v. Rutledge*, 460 U.S. 719 (1983); *Bretz v. Kelman*, 773 F.2d 1026 (9th Cir. 1985).

The plaintiffs have set forth no facts which would support a finding that the defendants acted with discriminatory intent. Conclusionary allegations, unsupported by facts, are insufficient to withstand a motion for summary judgment. Rule 56 mandates summary judgment if the non-moving party fails to make a showing sufficient to establish the existence of an element which is essential to the party's case and upon which the party will bear the burden of proof at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Where the non-moving party fails to make such a showing on any essential element, "there can be no 'genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* at 323. There being no evidence in the record to support plaintiffs' discrimination claims,

IT IS ORDERED that the defendants' motion for summary judgment against the plaintiffs on those claims is **GRANTED.** Plaintiffs' discrimination claims under §§ 1981, 1982, 1983 and 1985 are **DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED that:

1. The plaintiffs' claims against Larry Mummey, a fire department paramedic who was present at the scene but did not participate in the search or enter the residences, are **DISMISSED WITH PREJUDICE**.

2. The parties' myriad motions seeking permission to file extended-length briefs in support of the motions currently pending before the court (Ct. Rec. 260, 263, 283, 298, 309, 438, 441, 448, 467, 491, 502) are **GRANTED.**

Counsel are forewarned that any future motions for leave to file over-length briefs will be summarily denied unless leave is sought in a timely fashion.

3. Plaintiffs' motion to strike (Ct. Rec. 459) is **DENIED.**

4. Plaintiffs' motion for an extension of time (Ct. Rec. 277) is **DENIED AS MOOT.**

5. The C-89-423-AAM Plaintiffs' motions to join in the responsive pleadings filed by the C-89-425-AAM Plaintiffs (Ct. Rec. 271, 275) are **GRANTED.**

IT IS SO ORDERED. The Clerk is directed to enter this order and forward copies to counsel.

DATED this 21st day of October, 1993.

/s/ Alan A. McDonald
ALAN A. McDONALD
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

GYPSY CHURCH OF THE NORTHWEST, et al., Plaintiffs, v. SPOKANE COUNTY, et al., Defendants.	)	No. C-89-425-AAM No. C-89-423-AAM **ORDER DENYING MOTION TO STAY AND RESETTING DATES** (Filed Nov. 24, 1993)

Before the Court is City of Spokane Defendants' Motion to Stay Proceedings Pending Appeal, **Ct. Rec. 334** in C-89-323-AAM and **Ct. Rec. 525** in C-89-325-AAM. The motion was heard without oral argument on November 22, 1993. Plaintiffs in Cause No. C-89-423-AAM are represented by Jeffry K. Finer of Finer & Pugsley and Patrick Stiley of Spokane, Washington. Plaintiffs in Cause No. C-89-425-AAM are represented by Terry E. Thomson and Mark D. Deife of Sylvester Ruud Petrie & Cruzen, Seattle, Washington; and Gregg R. Smith of Spokane, Washington. Defendants Spokane County, Sheriff Larry Erickson, and Rick and Jane Doe Grabenstein are represented by Jerry R. Neal, John Nelson and Lori A. Terry of Preston Thorgrimson Shidler Gates & Ellis, Spokane, Washington. Defendant City of Spokane and the remaining Defendants are represented by James C. Sloane, Rocco N. Treppiedi, and Jeanie J. Mohler of the Office of the City Attorney, Spokane, Washington. For the reasons set out below, the Court denies City of Spokane Defendants' Motion to Stay Proceedings Pending Appeal.

A. SUMMARY

The Court believes that a stay of all proceedings would deny prompt justice to the parties and unduly expend the resources of the parties, this Court and the Ninth Circuit. Should the Court grant a stay, this Court's proceedings would be stayed for many months pending the Ninth Circuit's resolution of the issue of defendants' qualified immunity. Upon resolution, this Court could decide plaintiff's summary judgment motion, but that decision – again concerning the doctrine of qualified immunity – could itself be appealed. The Ninth Circuit would then be forced to revisit the same issue of qualified immunity, while the parties waited for many more months for resolution. Such a possible result makes the instant appeal frivolous, and the Court retains jurisdiction over these proceedings.

A consolidated appeal of the Court's ruling on plaintiffs' summary judgment motion together with appeal of the October 21, 1993 Order is a resolution better serving the parties' right to speedy justice, the goal of judicial efficiency and the doctrine of final order for appeal. To that end, the Court extends the period to appeal the October 21, 1993 Order.

B. JURISDICTION OVER THE INSTANT MOTION

In that a court is under a constant duty to assess that it has proper jurisdiction, it is axiomatic that the Court must address in some manner its jurisdiction to hear any issue before it. The instant issue, raised by motion, is the jurisdiction of this Court over proceedings following the

filing of notices of appeal.[1] Therefore, although the Court may find after hearing that it has no *future* jurisdiction, the Court does have jurisdiction to hear the preliminary, jurisdictional issue of the propriety of a stay.

C. PARTIES

Plaintiffs in Cause No. C-89-423-AAM are David Marks, James Senator Marks, II, Marie Marks, Michael Marks, Sonny Marks, Linda Marks, and Tina Marks (the "423 Plaintiffs"). Plaintiffs in the consolidated Cause No. C-89-425-AAM are the Gypsy Church and Grover Marks, Marie Marks, Marguerite Marks, Steven Marks, Robert Marks, Polly Marks, Richard Marks, Shirley Marks, Lisa Marks, Steve Marks, Larry Zeko, Laura Zeko, Robert Zeko, Jason Zeko, Crissie Zeko, Sonny Zeko, Peter Marks, and Buck Marks (the "425 Plaintiffs").

The 423 Plaintiffs have sued the City of Spokane and certain City employees (collectively the "City defendants"). The 425 Plaintiffs have sued Spokane County, Sheriff Larry Erickson, and Rick and Jane Doe Grabenstein (collectively the "County defendants").

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[1] A putative appellant need not bring its appeal to the attention of the Court in the form of a motion to stay in order for the Court to address jurisdiction after the filing of a notice to appeal; the district court will immediately observe such filing by virtue of Fed. R. Civ. P. 4(a)(1)'s requirement that notices of appeal be filed in the district court. However, here the Court's finding regarding its jurisdiction after putative appeal is informed by the motion to stay and resultant briefing.

D. BACKGROUND

During 1985, the Spokane community was plagued by a rash of residential burglaries. Believing the burglaries to be the work of an organized burglary ring, the Spokane Police Department set up a Burglary Task Force within its Investigative Division. By design, the Task Force worked closely with the Spokane County Prosecuting Attorney's Office, particularly with Deputy Prosecuting Attorney Patricia Thompson.

In late spring of 1986, Spokane County Detective Rick Grabenstein arrested a burglar named Mike White. White, who was linked to seventeen burglaries in the Spokane County, confessed to selling large quantities of stolen properties to "Gypsies" at three locations within the city limits: two residences at 428 and 802 S. Thor, and a used car business located near these residences. The residences belonged to Grover Marks and James Senator Marks, II.

Detective Grabenstein reported this information to the City's Burglary Task Force. The Task Force decided to use White as a "cooperating individual" together additional evidence establishing the Marks' involvement in the purchase of stolen property. Since Detective Grabenstein had established a good working rapport with White, the County temporarily assigned him to the City's Task Force to assist in the investigation of the alleged fencing operation.[2]

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[2] The County asserts that during the short period of time that Grabenstein was working with the Task Force, he was under the supervision of the Spokane Police Department, not

White, under the direction of the Task Force, made several attempts between June 10 and June 17, 1986, to effectuate undercover sales of stolen property to the residents at 428 S. Thor and 802 S. Thor. Three of the sales were successful. On June 10, 1986, White sold several items of jewelry, which he indicated were stolen, to James Senator Marks II at the 802 S. Thor address. On June 12, 1986, White again sold property which he represented as stolen to James Marks at 802 S. Thor. This transaction was recorded on audio and video tape pursuant to court order. On June 17, 1986, White sold purportedly stolen jewelry and silverware to plaintiff Lippie Marks at the residence located at 428 S. Thor. That purchase was also recorded on audio and video tape pursuant to court order.

On June 18, 1986, at approximately 11:00 a.m., White attempted to sell more stolen goods at 802 S. Thor, but was refused by plaintiff Jane Marks. Believing the refusal to have resulted from a compromise of the investigation and fearing the destruction or disappearance of evidence, the Task Force immediately sought to obtain search warrants for the residences. This decision was approved by Lieutenant Larry Freeman who was in charge of the Task Force and Captain Robert Allen, the Captain of the Investigative Division. Captain Allen authorized the use of detectives from other units in the Investigative Division, and also obtained permission from the Chief's Office to

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the County Sheriff's Office. However, other than the conclusory statements made by Grabenstein and Sheriff Erickson, the County has produced no evidence to support this assertion.

recruit additional personnel from other divisions in the department.

Lieutenant Freeman, as commander of the Crimes Against Property Unit and supervisor of the Task Force, served as commander of the overall operation. Detective Grabenstein was assigned the position of case manager for the search at the 428 S. Thor residence. City Detective Neumiller was designated case manager for the search at the 802 S. Thor residence. City Detective Andrew Pavlischak, another member of the Task Force, was assigned the role of developing the basic plan for securing the houses and ensuring safety during the searches.

Detectives Grabenstein and City Detectives Sheldon Reeve and Jack Neumiller were directed to prepare a search warrant. At approximately 11:20 a.m., the trio went to the public safety building to prepare the affidavit and search warrant. The affidavit of probable cause was prepared for Detective Grabenstein's signature since he was the officer who arrested Michael White, investigated the burglaries, and corroborated other details contained in the affidavit. The officers compiled a list describing the property which White had sold to plaintiffs James and Lippie Marks on June 10, 12, and 17, 1986. At the suggestion of Detective Neumiller, the officers also attached to the affidavit and warrant more than 38 pages of stolen property reports which were prepared by the actual property owners who were previously victimized by White. The inclusion of these lists was based on White's statement that he and his accomplices had sold the stolen property to the residents of these two houses. (However, this connection was not reduced to writing in the application for the search warrant.)

According to the defendants, the inclusion of stolen property reports in an affidavit of probable cause was not a practice taught by the police department, but was a standard practice used by Detective Neumiller and other officers. Due to the urgency of obtaining the warrant, the officers did not have time to type in the affidavit and warrant all of the items described in the property lists. They contend that it is an accepted practice among the Spokane County judiciary to accept the property lists contained in police reports of residential burglaries as part of an affidavit of probable cause or search warrant for stolen property. The district court judges recognize the fact that officers would be looking for the additional items that were attached to the search warrant.[3]

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[3] This does indeed appear to be the understanding that Judge Tanksley had of the lists attached to the affidavit and warrant when he signed the warrant later that day. On June 23, 1986, during the hearing on the Gypsies' motion for return of money seized in the search, Judge Tanksley stated:

> I was presented an Affidavit which set forth some rather specific and, quite frankly, well put together statements reference [sic] a probable cause in some detail, both affixed to the affidavit and to the search warrant which I signed, are numerous pages of police reports, burglary reports, which set forth in detail items allegedly taken in burglary whereby there was suspicion that some of the loot, or some of the things taken, were in one of these two residences on South Thor, or in some vehicle owned by the defendants adjacent thereto.
>
> * * *
>
> [N]obody haw [sic] really challenged that law enforcement people had a search warrant, they were in the two houses legally and properly. There's no

The affidavit and warrant were reviewed by Deputy Prosecuting Attorney Patricia Thompson at approximately 2:45 p.m. Grabenstein then presented the affidavit and warrant to Judge Raymond Tanksley, Spokane County District Court Judge. Judge Tanksley reviewed the affidavit and warrant, asked Detective Grabenstein questions, including a specific question about the stolen property lists, and signed two copies of the warrant. Immediately upon the signing of the warrants, Detective Grabenstein and Detective Reeves drove to the 428 S. Thor residence. Detective Grabenstein got out of the vehicle and Detective Reeves continued on to the 802 S. Thor residence.

During the noon hour, the police conducted a general briefing for those who had been recruited to assist in the search. During the briefing, Detective Neumiller described the basic property that the two search warrants would seek. (Captain Allen, Lieutenant Freeman, Detective Neumiller and Detective Pavlischak addressed those who were present at the briefing). Since the warrants were not yet completed or signed, the officers were informed that the warrants would be generally seeking items commonly stolen in residential burglaries, consisting mostly of jewelry, silverware, electronic equipment and photography equipment. Following the briefing session, which lasted approximately 30 minutes, the officers were dispatched to a staging area near the two homes where they were to await the delivery of the warrants.

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question about that. The warrant, in my opinion, was properly issued, executed, with the exception of the money.

According to the defendants' representation of the facts, officers began arriving at the residences at approximately 1:00 p.m. Sometime near 2:00 p.m., surveillance crews observed James Marks arrive at his residence at 802 S. Thor, enter the house and come back out with a box that he placed in the trunk of his car. Marks then got in the car and drove away. About this same time, surveillance crews observed a car with several individuals leave Grover Mark's residence at 428 S. Thor. Concerned that evidence was being removed from the house, Lieutenant VanLeuven telephoned Deputy Prosecuting Attorney Patricia Thompson who informed him that the officers could either seek consent from the residents to enter the homes and await the arrival of the warrants, or they could secure the premises from the outside to prevent any ingress or egress.

Both of the cars that were seen leaving the residences were stopped by officers for alleged traffic violations. The car driven by James Marks was stopped by Officer Robert G. Bailor, under the pretext that the car lacked license plates. Officer Lindskog arrived at the scene of the stop immediately thereafter and advised Marks of his constitutional rights. After waiving his rights, Marks consented to the search of his vehicle and signed a consent form to that effect. (The consent form was signed by James Marks at 2:00 p.m.) After the search was completed, Marks voluntarily agreed to return to his home with the officers.

The vehicle which was observed leaving the 428 S. Thor residence was stopped by Officer Weir for some illegal turn or lane change. David Marks, Jane Marks, and one or more of David's aunts were in the vehicle. The occupants were ordered to return to the house where they

would await the search warrant. While defendants maintain that the stop of David Marks' vehicle occurred shortly after 2:00 p.m., David Marks contends that he was stopped sometime around 9:30 a.m. The radio call card from the police dispatcher supposedly indicates that the stop was made at 2:00 p.m. (The call card was not submitted as evidence).

Detective Neumiller, the case manager at the 802 S. Thor residence, states that he arrived at that address at the same time that James Marks and the officers returned (sometime around 2:00 p.m.). Detective Neumiller maintains that he explained to James Marks that the police were in the process of obtaining a search warrant for the house to look for stolen property. He advised Marks of his Constitutional rights at 2:52 p.m. and Marks signed the rights card, indicating he wanted to talk to his attorney. The defendants state that Marks telephoned his attorney, Robert McGoldrick, and then informed the officers that they were welcome to search the house. Detective Neumiller declined the invitation, and told Marks that they would wait for the arrival of the warrant. Sergeant Ennis, Detective Monte Gaunt and Detective Neumiller waited inside the residence while the other officers were outside establishing a security perimeter.

Defendants claim that upon Detective Reeves' arrival at James Marks' residence at 802 S. Thor, he gave the warrant to Detective Neumiller who in turn gave it to James Marks. Near the beginning of the search, James Marks allegedly walked over to a china hutch, grabbed some items out of a bowl, threw them down on a table, and stated, "These are the items that your blond hair boy sold to us, because he needed gas money. I gave him

some money for them." Detective Neumiller recognized the items as those given to White for the undercover sale. The search continued and the officers found some more jewelry in a safe located in the bathroom. Detective Neumiller states in his affidavit that he asked James Marks whether there were any cameras or photographic equipment in the house (this question was posed to Mr. Marks after he had asked to speak to his attorney) and Marks responded that there were not. The officers then found numerous pieces of photography equipment, including cameras, lenses, flash units, etc. Some but not all of the equipment matched the general descriptions of equipment referred to in the warrant.

Later in the afternoon, Marks' attorney, Robert McGoldrick, came to the 802 S. Thor residence. According to the defendants, after reviewing the search warrant, Mr. McGoldrick advised James Marks that he should allow the search. According to the plaintiffs, Mr. McGoldrick asked to see the warrant but was advised that the warrant was at Grover's house and he would have to go there to read it. When Mr. McGoldrick went to Grover's house, the officers refused to let him enter or read the warrant.

The search at the 802 S. Thor residence concluded at approximately 7:18 p.m. Before the search was completed, James Marks had left the residence to go to Grover's house.

Detective Grabenstein states by affidavit that he arrived at S. 428 Thor at approximately 3:30 p.m. and delivered a copy of the signed search warrant to Grover Marks. Grover Marks asked Grabenstein to read him the warrant, but Grabenstein refused because he was too

busy. Grabenstein told Grover that he could find someone else to read it to him. Grabenstein read Grover Marks his *Miranda* rights and obtained Mr. Mark's signature on the rights card at 3:40 p.m. Only then did the officers begin to search the premises. Because the warrant authorized the search for jewelry and silverware, the officers searched in all places in which such items could be secreted. The officers collected numerous items not listed on the warrant based on the plain view doctrine, having determined that the house contained an enormous amount of such items, far beyond the amount one might ordinarily expect to find as personal property. (The search warrant itemized only 57 items of property; approximately 200 items were seized at 802 S. Thor, and approximately 440 items, including canisters of money, were removed from 428 S. Thor.).

During the course of the search, all of the people who were at the South 428 Thor (Grover's) residence were searched, even those who were just visiting. Detective Denise Coker searched all women and children, including a five year old girl and a baby. All jewelry and money worn or possessed by the individuals was removed for subsequent seizure. Much of the operation was videotaped and, interestingly, one of the videotapes shows a watch removed from Grover Marks which displayed the time as 1:07.

A metal box with more than $20,000 and some jewelry was found in a bedroom at the 428 S. Thor address. Not knowing at that time that additional amounts of money would also be found, the officers merely filmed the box and its contents and returned it to the closet from

which it had been retrieved. This box subsequently disappeared. Officer Grub states that he believes he saw David Marks leave the residence with the metal box during the search operation.[4]

A footlocker and several cans of money were subsequently found under a false floor in the 428 S. Thor residence. In total, approximately $1.6 million was discovered at the residence. During the course of the search,

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[4] Officer Grub explains the incident as follows:

> At approximately 6:30 p.m., I was ordered to go to the 428 S. Thor residence because of problems the officers were having there with people who had arrived there. I reported to Detective Andrew Pavlischak who was in charge of security there. He positioned me between the kitchen and some other rooms. Detective Pavlischak told me not to let any people leave with any items. I was then sent outside to the edge of the yard to the west of the house. While I was at the outside post I observed commotion and other activity that distracted me from my duties. While at that post a female adult opened the back door to the house and said something in what I believe to be the gypsy language to people who were standing behind me. I didn't understand what they were saying. At that time an elderly lady behind me started screaming and she collapsed to the ground. Two of the younger ladies that were there and one of the younger men tried to get her to stand up, and she kept screaming and collapsing every time she stood up. I was watching her and trying to watch the door at the same time, and at that time David Marks, whom I identified earlier that day at the traffic stop on Sprague Avenue, left the residence carrying a small file box or strong box. I assumed he had permission to leave with that box but I was wrong; I made an error in allowing him to leave the residence with the box.

the officers made several calls to Lieutenant Freeman (who was back at the police station), seeking advice on what to do with the cash. Initially, Lieutenant Freeman advised them not to seize the cash as it was not included in the warrant and it was not clear whether it could be linked to any illegal activity. As additional amounts were discovered, Lieutenant Freeman telephoned Captain Allen who suggested that the officers contact Deputy Prosecutor Patricia Thompson and AUSA Jim Crum for legal advice regarding the seizure of the cash. Thompson told the officers that they need not attempt to amend the warrant or seek another warrant, even though the original warrant did not mention cash, because the cash was seized pursuant to the plain view doctrine. AUSA Crum advised the officers to hold the cash for IRS seizure.

Due to the plaintiffs' disruptive conduct[5] which prevented an orderly search of the premises, the Spokane Police Tactical Command (Captain Allen) ordered the property moved to the Public Safety Building where the search was to be completed. The money was transported to the Public Safety Building in an unmarked vehicle by Detective VanLeuven. VanLeuven was accompanied by Grover Marks and Sergeant Yates. James Marks followed in his own vehicle. The jewelry was transported in a vehicle operated by Detective Poole. Detective Grabenstein rode in the vehicle with the jewelry. When he arrived

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[5] The officers state in their affidavits that one woman threw herself on the floor and complained that she was having some type of attack, while others were screaming and wailing. They state that several members of the Marks family were creating diversions and attempting to hide items and money that had already been found and inventoried.

at the Police Station at approximately 8:00 p.m., Detective Grabenstein prepared a search warrant return and inventory, as he was instructed to do. The inventory process was completed around 1:00 a.m. on June 19, 1986. The property sheets prepared by each of the seizing officers were copied and attached to the standard search warrant return, which was given to Mr. Grover Marks.

Several of the officers who were present during the search of Grover Marks' residence or who were present at the Public Safety Building for the final stages of the operation, state that the Marks gave several different, inconsistent and unbelievable explanations for the existence of the case, including: the money belonged to "General Motors"; the Gypsies do not trust banks and do not deal with banks; the cash represents the resident's life savings; the money was given to Grover by a car dealer for the purchase of cars on June 19, 1986; Grover's house was the bank for the local Gypsies and the money belonged to the individuals whose names were written on the top of the canisters; and the money belongs to the boys from Kansas City who would be quite upset if they found out that the money had been taken from the house.

The Internal Revenue Service sent two investigators to the Police Station to observe the counting of the money and to make assessments about the circumstances. On June 23, 1986, the IRS served a series of liens or notices of seizure on the City of Spokane for the cash that had been seized from Grover's residence. Also on that day, the City was served with a certified copy of a Writ of Garnishment in the amount of $42,864.89 from Spokane County Superior Court File No. 80-2-02048-4. The money, excluding

$43,000 for the garnishments, was turned over to the IRS. The $43,000 was deposited in a separate bank account.

On June 20, 1986, the Marks filed a motion for return of the cash that was seized from Grover Marks' residence, and asked for an expedited hearing on the matter. Over the County Prosecutor's objection, an expedited hearing was conducted on June 23, 1986, before Judge Tanksley, the judge who issued the warrant. Judge Tanksley denied the County's motion for permission to present oral testimony or written affidavits of the officers who participated in the search, on the basis that such testimony (even if it disclosed extremely damning statements made by the defendants at the time of the search) could not affect or alter the court's ruling regarding the illegality of the officers' actions in seizing the **cash**.[6] Judge Tanksley ruled that the cash was outside the scope of the warrant[7]

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[6] As stated above, Judge Tanksley found no illegality or impropriety in the officers' conduct with respect to the other items seized.

[7] On this point, Judge Tanksley stated:

> Now, preliminarily, the rights of law enforcement officers in this case in seizing property was based upon the search warrant which was executed, which in turn was based on the affidavit for probable cause, which accompanied that warrant. That affidavit for probable cause did not allege any money laundering or Rico violation, though it does indicate First Degree Trafficking in Stolen Property. The affidavit in some length refers to buying of stolen property by the Marks, doesn't refer to selling, and the parties all concede that the term "money" was not specifically listed int he [sic] warrant or in the affidavit, except somewhat casually. that is, that as you read the individual burglary reports, there are references to

and that the plain view exception did not apply because, although the officers were legally present and the cash was inadvertently discovered, the cash was not immediately identifiable as evidence of a crime:

> What is the money evidence of? It's not marked, not identifiable. This is not a situation where we're dealing with – if the officers had found automatic weapons or if they found plates to print United States currency, or if they found illegal drugs, or something on the face of things that is clearly illegal. It's money and money is not illegal and is not identifiable, at least as far

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something under $20,000 taken in various burglaries, one of which involved $9,700 in cash. These are – none of the materials, the burglary reports or the affidavit for probable cause, set forth any method whatsoever whereby one could identify and of the money taken in any of the burglaries. Some of them indicated rolled coins, some of it indicated bills by various denominations, but there were no serial numbers, nothing indicating any marking or anything that they could be identified. Now, secondly, and it's important I think in analyzing the matter to note that there was no telephonic or second search warrant asked for or given with reference to the money, which means also there was no specific probable cause affidavit ever submitted upon which an authorization to seize the money could have been based. Mr. Korbas, representing the State, very honestly said, in effect, that the money was unexpected. They had no reason at all to believe they would find in excess of a million and a half dollars, and added, admittedly, the State does not have proof here tody [sic] that the money is specifically related to crimes or any specific crime or crime in general, even, other than the suspicion based on the stolen property matters which are, in fact, covered by the probable cause affidavit.

> as what we have before us is concerned. It's just money. And so the question of, is there or should there have been in this case an immediate knowledge by the officers that he has evidence, sitting here this afternoon? I don't know. I don't think the State knows that you've got evidence of any kind of a crime just because there's money there. There's nothing, other than suspicion, to connect the money to crime, and quite honestly, as I studied over the affidavit upon which I issued the search warrant, there's nothing that pretends to indicate that the magnitude of the suspicion, the buying of stolen goods, is anywhere near the magnitude that's referred to here. So I have come to the conclusion that the possession by Mr. Marks of the money with the background here, really doesn't prove anything. It doesn't prove that it's evidence of the commission of any crimes.

(Defendants' Joint LR 56 Statement, Ex. 58, p. 7-8). The Judge then granted the defendants' motion for return of the property, subject to the IRS notice of seizure.

On July 11, 1986, Judge Tanksley ordered the City to pay $42,864.89 into the Court. The City paid that amount on July 31, 1986 and closed the bank account. The remaining balance, $357.79 was turned over to the IRS pursuant to the original notice of levy and seizure.

In July 1986, after consulting with Deputy Prosecutor Thompson and receiving approval from the Chief of Police, but without court order or approval, the Spokane Police Department held a public viewing of the remaining property. The viewing was generally limited to people who could prove that they were the victim of a crime during the last three years that had been reported to a

law enforcement agency. Thirty-five people who attended the viewing were able to identify items as their property.

In December 1986, the State of Washington brought a criminal action against James Senator Marks, II, Jane Marks, Grover Marks and Marie "Lippie" Marks, charging them with trafficking in stolen goods. In November 1987, Judge Murphy conducted a hearing on defendants' motion for return of the seized property and ordered the State to return to the defendants all property that had not been identified as stolen. The items that had been characterized as stolen, remained subject to further proceedings in the court.

In May 1988, the Marks moved to dismiss the criminal charges against them and/or to suppress evidence seized during the June 18, 1986 search. After a lengthy evidentiary hearing which was held in June 1988, Spokane Superior Court Judge John A. Schultheis granted the motion and dismissed the action. Judge Schultheis found it impossible to determine in reading the property lists attached to the search warrant either their relevance to or connection with the property to be seized from the residence. He found no reference to the property lists in the search warrants, nor any allegation that identified the defendants as possible suspects in the thefts or burglaries, nor any suggestion that any of these items might have been sold to or by any of the defendants.

Judge Schultheis also found: that there was strong evidence indicating that the search may have begun prior

to Judge Tanksley's signing of the warrant at 3:10 p.m.;[8] that Detective Grabenstein refused to read Grover Marks the warrant even though Mr. Marks stated that he could not read it himself; that the officers refused to allow the Marks' attorney to read the warrant or to confer with his clients; that none of the officers conducting the search (other than Grabenstein) saw a copy of the search warrant either prior to or during the search; that the warrants lacked particularization to such an extent that the officers had no guidelines from which to determine what could or should be seized, thereby giving complete discretion to the individual officers conducting the search; that the officers conducted a general search of the homes as well as of the persons who were present at the residences; and

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[8] In his Findings of Facts, Judge Schultheis states:

> Although the search warrants were not delivered to the respective homes until approximately 3:30 p.m., and were not signed by Judge Tanksley until approximately 3:10 p.m., a watch is shown in the police videotape made at South 428 Thor. This watch had been removed from the wrist of Grover Marks. The time on the watch shows 1:07. It is very evident from the videotape that the watch is operating. In addition, an ambulance was called, as well as a Paramedic Squad truck, to the area of the Markses' residences at 2:56 p.m. on June 18, 1986. The ambulance and paramedic units were called to the scene because of apparent fainting and other physical problems experienced by some of the occupants at South 428 Thor during the course of the search. At the hearing, Sgt. Ennis testified that they were called at his order and at his direction after the discovery of the money; this was when the physical problems and disturbances began, and this occurred when the search was nearly completed.

that no inventory of or receipt for any property or money seized was left with the residents at either address. Based on these findings, Judge Schultheis concluded that the searches were violative of the Fourth and Sixth Amendments of the United States Constitution; Article I, Sec. 7 of the Washington State Constitution; and Washington State criminal laws.[9]

The Gypsies instituted the present Civil Rights actions in June 1989. On March 30, 1991, Judge McNichols entered an order precluding the defendants from relying on the plain view doctrine to justify the seizure of cash and property not specifically identified in the warrant, because the first element of the doctrine – a lawful initial intrusion – was absent. The judge premised its ruling on the state court's determination that the warrant and resulting searches and seizures were illegal. Judge McNichols expressly adopted the state court ruling through the application of collateral estoppel.

On September 11, 1991, Judge Robert J. McNichols determined that the doctrine of collateral estoppel would also be applied to prevent relitigation of the state court's determination that the plaintiffs' Fourth Amendment rights had been violated by the illegal search of June 18,

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[9] The State appealed the district court's dismissal of the action and its order directing the return of the money, but did not appeal the court's ruling on the suppression issue. The Washington Supreme Court reversed the trial court's order of dismissal, reinstated the criminal charges against the defendants and remanded the property matter to the trial court for an evidentiary hearing.

1986. Defendants moved for reconsideration of the court's order regarding the collateral estoppel issue, but the motion was denied in November 1991. The defendants' second motion for reconsideration was likewise dismissed on March 13, 1992. Judge McNichols noted that the state trial court, after conducting a lengthy hearing, determined that the search warrant was overbroad and insufficiently specific and that the defendant officers operated with complete discretion in executing a general search of the plaintiff's home. To refuse application of the collateral estoppel doctrine under these circumstances would, in the opinion of Judge McNichols, "essentially prevent any state criminal trial findings, no matter how clear, from being used as the basis for offensive collateral estoppel in a subsequent civil action."

In January 1992, the plaintiffs moved for summary judgment against the defendants on the remaining issues of liability. Two weeks later, both the City and the County defendants also filed motions for summary judgment.[10]

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[10] The defendants' motions for summary judgment sought dismissal of all claims against the County, the City, the individual officers, and Sheriff Erickson. Defendants listed three bases for their motions: (1) the officers were entitled to qualified immunity from suit under § 1983; (2) plaintiffs' alleged injury was not caused by an unconstitutional custom, policy or practice of the City or the County; and (3) there was no evidence that any County defendant's actions were motivated by racial animus.

Defendants' argument with respect to the qualified immunity issue was premised on the assumption that the Court would vacate Judge McNichols' decision on the collateral estoppel issue and revisit questions concerning the legality of the warrant/search. Defendants argued that the information in

For reasons that are not clear from the record, Judge McNichols conducted a hearing on plaintiffs' motion but stayed hearing on the defendants' motions. Judge McNichols denied the plaintiffs' motion for summary judgment against the individual officers. (His ruling is contained in the March 13, 1992 order which also denied the defendants' second motion for reconsideration of the collateral estoppel decision.) The main gist of the plaintiffs' motion was to eliminate qualified immunity as a defense to the civil rights actions against the individual officers. Judge McNichols found that there existed many disputed issues of material fact, including: (1) the degree of each individual defendant's involvement in the searches and seizures, (2) the identities and positions of the official policymakers for the City and County, and (3) the existence or nonexistence of any official or unofficial policies and customs. (Ct. Rec. 304). Judge McNichols concluded that "The court may not substitute for the fact-finder and choose between competing factual scenarios in a summary judgment proceeding. It is not for one man, nor the court in summary judgment proceedings, to decide key issues of vigorously disputed fact such as those here in question."

The plaintiffs moved the court to reconsider its March 13, 1992 decision, to the extent it denied summary judgment against the individual defendant officers who

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Grabenstein's affidavit was sufficient to establish probable cause for the issuance of the warrant; that the warrant was sufficiently specific to satisfy 4th Amendment standards; and that the seizure of any items not listed in the warrant was reasonable under the plain view doctrine.

participated in the June 18, 1986 search. Because the parties entered into a stipulated settlement agreement, the court never ruled on the plaintiffs' motion for reconsideration or the defendants' motions for summary judgment. These motions came before the Court on August 12, 1993, together with defendants' third motion for reconsideration of Judge McNichols' order which, through the application of the collateral estoppel doctrine, adopted the state court's finding that the plaintiffs' Constitutional rights were violated. On October 21, 1993, the Court granted defendants' motion for reconsideration (thereby vacating that portion of the Court's September 11, 1991 order applying the collateral estoppel doctrine to defendants other than the County and City), granted plaintiffs' motion for reconsideration to a limited extent (thereby setting a rehearing of plaintiffs' motion for summary judgment, and holding that the qualified immunity defense is unavailable to all officers other than Grabenstein and Reeves, whose immunity would be revisited should summary judgment be granted against them), and granted the defendants' claims for summary judgment.

On October 28, 1993, the Court heard a variety of motions: Defendants' Joint Motion for Protective Order to Prevent Plaintiffs from Contacting Defendants, their Witnesses, and Counsel (denied); Defendants' Joint Motion to Re-Open Discovery (denied); Defendants' Joint Motion to Compel Discovery of Bank Records (denied); City Defendants' Motion to Bifurcate Trial (reserved pending resolution of plaintiffs' motion for summary judgment); Defendants' Joint Motion to Change Venue to Spokane (denied); and Spokane County's Motion for Dismissal Under RCW 4.93.040 (denied).

Therefore, as of October 28, 1993, only two motions were outstanding: Defendants' Motion to Bifurcate Trial[11] and Plaintiffs' Motion for Summary Judgment on Commission of Constitutional Violations, and Issue of Liability as to All Individual Defendants[12]. Additionally, Grabenstein's and Reeves's immunity would be revisited should summary judgment be granted against them.

On November 4, 1993, Defendant Erickson filed a Motion for Clarification of October 21, 1993 Order (to include a determination of his motion for summary judgment)[13].

On November 10, 1993, the City defendants filed notices of appeal of the Court's October 21, 1993 Order denying qualified immunity to the individual defendants (with the exception of Reeve [sic]) and denying the defendants' summary judgment motions based on the doctrine of qualified immunity. On the same day, the City defendants filed the instant Motion to Stay Proceedings Pending Appeal[14].

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[11] Ct. Rec. 250 in C-89-423-AAM and Ct. Rec. 428 in C-89-425-AAM; not set for hearing.

[12] Refiled as Ct. Rec. 323 and 327 in C-89-423-AAM and Ct. Rec. 515 and 519 in C-89-425-AAM; set for hearing December 17, 1993.

[13] Ct. Rec. 319 in C-89-423-AAM and 511 in C-89-425-AAM; set for hearing November 26, 1993.

[14] Ct. Rec. 334 in C-89-323-AAM and Ct. Rec. 525 in C-89-325-AAM. This motion was heard on November 22, 1993, after the Court granted the City's Motion to Shorten Time for Hearing on Motion to Stay (Ct. Rec. 333 in C-89-323-AAM and Ct. Rec. 524 in C-89-325-AAM) on November 15, 1993.

E. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The City defendants argue that a denial of qualified immunity is appealable immediately as a matter of right. They claim that their appeal of the Court's denial of qualified immunity divested the Court of jurisdiction, and that all proceedings here must be stayed.

It is true that *ordinarily*, an appeal of a denial of qualified immunity immediately divests the lower court of jurisdiction over the proceedings. However, as this appeal is frivolous, this Court retains jurisdiction and may decide the outstanding motions.

E(1). Denial of Immunity as an Immediately Appealable Issue.

Ordinarily, courts of appeals have no jurisdiction to review orders of a district court until there is a "final decision" from the district court. 28 U.S.C. § 1291. (Exceptions exist for certain interlocutory decisions under 28 U.S.C. § 1292, but these are inapplicable.)

However, under the collateral order doctrine, an order may be appealable if it addresses important issues separable from and collateral to the merits of the main action. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47 (1949). To be reviewable, the order must "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* at 546. "[A] denial of a claim of qualified immunity, to the extent that

it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. 1291 notwithstanding the absence of a final judgment." *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). A denial of a defendant's motion for summary judgment based on qualified immunity thus is a collateral order, because the motion is decided as a matter of law (e.g., the court assumes the plaintiff's facts rather than fact-finding). *Id.* at 527; *Nelson v. Silverman*, 999 F.2d 417, 418 (9th Cir. 1993). Thus, here the denial of defendants' motion for summary judgment on October 21, 1993 is immediately appealable. The City defendants' appeal on November 10, 1993 therefore appears valid.

E(2). Jurisdiction After the Filing of a Notice of Appeal.

"The filing of a valid notice of appeal . . . confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). *See Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 379, *reh'g denied*, 471 U.S. 1062 (1985). The issue appealed here is that of the qualified immunity of the City defendants, which is not only a defense but "an entitlement not to stand trial or face the other burdens of litigation." *Mitchell*, 472 U.S. at 526, citing *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). "[L]ike an absolute immunity, [qualified immunity] is effectively lost if a case is erroneously permitted to go to trial." *Mitchell*, 472 U.S. at 526. Therefore, here the "aspects of the case involved in the appeal" includes *all* prospective litigation; the City defendants' notice of appeal should divest the Court of jurisdiction

over all but the instant Motion to Stay (which asks the Court only to examine its jurisdiction in light of the appeal) and the Motion for Clarification (which asks the Court to explain, but not further decide, a prior order)[15]. *See Harlow*, 457 U.S. at 818 ("Until this threshold immunity question is resolved, discovery should not be allowed."); *Stewart v. Donges*, 915 F.2d 572, 576 (10th Cir. 1990) ("[A]n interlocutory appeal from an order refusing to dismiss on . . . qualified immunity grounds relates to the entire action and, therefore, it divests the district court of jurisdiction to proceed with any part of the action against an appealing defendant."), *costs/fees proceeding*, 979 F.2d 179 (10th Cir. 1992); *Apostol v. Gallion*, 870 F.2d 1335, 1338 (7th Cir. 1989) ("[A] proper *Forsyth* appeal divests the district court of jurisdiction (that is, authority) to require the appealing defendants to appear for trial.").

But there is an exception to the bright-line rule of divesture whenever a party files an appeal. The Ninth Circuit, as other circuits[16], except from this bright-line rule cases of frivolous or dilatory appeal:

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[15] Defendants County have not filed notices to appeal, and stay may not be appropriate as to them. However, the Court finds that the very duplicity of the cases against the County and City that led to consolidation of the cases makes it inefficient to stay only the case against the City.

[16] Other Circuits have made a frivolous-appeal exception to the rule of divestiture of district court jurisdiction upon the filing of a notice of interlocutory appeal. *See, e.g., Yates v. Cleveland*, 941 F.2d 444, 449 (6th Cir.) (discussing the exception but holding it inapplicable in the absence of a finding of frivolity), *reh'g, en banc, denied*, 1991 U.S. App. LEXIS 26,582 (6th Cir. Oct. 1, 1991); *Stewart*, 915 F.2d at 576 ("Upon such a

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procedure [hearing and giving of substantial reasons] and an explicit finding that the claim raised on appeal was frivolous, the district 'court should not be held divested of jurisdiction.' ") (quoting *United States v. Hines*, 689 F.2d 934, 937 (10th Cir. 1982)); *Apostol v. Gallion*, 870 F.2d 1335, 1339 (7th Cir. 1989) ("If the complaint of immunity is a sham, however, the notice of appeal does not transfer jurisdiction to the court of appeals, and so does not stop the district court in its tracks."); *United States v. Bizzard*, 674 F.2d 1382, 1385-86 (11th Cir.) ("[We] permit a district court to take into consideration the previous procedural activity of the defendant, which would indicate a frivolous approach to the procedural problems in the orderly administration of justice."), *cert. denied*, 459 U.S. 973 (1982); *Hines*, 689 at 936-37 (10th Cir. 1982) ("[W]here, as here, the district court has considered the double jeopardy claim after a hearing and, for substantial reasons given, found the claim to be frivolous, the court should not be held divested of jurisdiction."); *United States v. Grabinski*, 674 F.2d 677, 678, 679 (8th Cir. 1982) ("We hold that a district court's order denying a defendant's motion to dismiss based on a claim of double jeopardy is appealable only if a colorable claim is made."; "[W]e request a district court judge who denies a motion to dismiss based on double jeopardy to make a written finding of whether the motion is frivolous or nonfrivolous. If the motion is found to be frivolous, the filing of a notice of appeal will not divest the district court of jurisdiction."), *cert. denied*, 459 U.S. 829 (1982); *United States v. Lanci*, 669 F.2d 391, 394 (6th Cir.) ("We conclude that the district court had jurisdiction to proceed, having determined that the interlocutory appeal lacked any "colorable foundation."), *cert. denied sub nom. Liberatore v. United States*, 457 U.S. 1134 (1982); *United States v. Dunbar*, 611 F.2d 985, 988 (5th Cir.) ("[T]he district courts, in any denial of a double jeopardy motion, should make written findings determining whether the motion is frivolous or nonfrivolous. If the claim is found to be frivolous, the filing of a notice of appeal will not divest the district court of jurisdiction over the case."), *cert. denied*, 447 U.S. 926 (1980).

> Should the district court find that the defendants' claim is frivolous or has been waived[17], the district court may certify, in writing, that defendants have forfeited their right to pretrial

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Many of these cases concern a denial of a claim of double jeopardy, not qualified immunity. However, the claims are analogous in that they both represent not merely a defense but protection against litigation. *Compare Mitchell*, 472 U.S. at 527 (qualified immunity) *with Abney v. United States*, 431 U.S. 651, 662 (1977) (double jeopardy); *see also Chuman v. Wright*, 960 F.2d 104, 105 (9th Cir. 1992) (Ninth Circuit adopting the frivolous-appeal exception by adopting its ruling from a case of interlocutory double jeopardy appeal, calling the claims "closely related.").

Abney in fact advocated procedures to limit dilatory appeals:

> Admittedly, our holding [that pretrial orders rejecting claims of former jeopardy are immediately appealable) may encourage some defendants to engage in dilatory appeals as the Solicitor General fears. However, we believe that such problems of delay can be obviated by rules or policies giving such appeals expedited treatment. It is well within the supervisory powers of the courts of appeals to establish summary procedures and calendars to weed out frivolous claims of former jeopardy.

431 U.S. at 651 n.8. The district courts in the circuits above, as the Court here, have taken on a similar responsibility to police frivolous interlocutory appeals.

[17] The 425 Plaintiffs argue that the City defendants have waived their right to appeal the issue of their qualified immunity because of their failure to appeal a May 30, 1990 Order denying qualified immunity. The Court makes no finding as to waiver, because it finds that the appeal is frivolous. However, the Court does note that Fed. R. App. P. 4(a) refers to an *order*, not an *issue*, appealed from. The City defendants timely appealed from the October 21, 1993 Order.

> appeal, and may proceed with trial. In the absence of such certification, the district court is automatically divested of jurisdiction to proceed with trial pending appeal.

Chuman v. Wright, 960 F.2d 104, 105 (9th Cir. 1992) (footnote omitted; footnotes added). An appeal from the denial of qualified immunity does not divest the district court of jurisdiction if the district court has found the motion to be frivolous; rather, the district and appellate courts share dual jurisdiction over the proceedings. *Id.*

Frivolousness can be adjudged either from procedure (i.e., the putative appellant's use of appeal as a delay tactic, adjudged from the appellant's action of filing and then withdrawing an appeal, or other procedural games-playing)[18] or substance (i.e., appeal of a noncolorable claim)[19].

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[18] *See, e.g., Bizzard*, 674 F.2d at 1385 (upholding a finding of frivolousness where defendant noticed four appeals, suspending the trial, then dismissed the appeals some ten months later); *United States v. Leppo*, 634 F.2d 101, 105 (3d Cir. 1980) (finding that a motion to dismiss an indictment after trial was dilatory and frivolous when made more than six weeks after a mistrial was granted, after trial already had been postponed one month at defendant's request; the Court also made a finding of a noncolorable claim); *Dunbar*, 611 F.2d at 988 (finding frivolousness where defendant did not file his double jeopardy motion until a few days before trial, so that the appeal taken on the ruling was in effect a trial continuance).

[19] See, e.g., Hines, 689 F.2d at 936-37 (upholding the trial court's finding of frivolousness based on the merits of the double jeopardy claim asserted; the opinion does not elucidate the finding on the merits); *Grabinski*, 674 F.2d at 678, 679 (finding that an order denying a defendant's motion to dismiss based upon a claim of double jeopardy is appealable only if a

The appellate courts' adoption of the frivolous appeal exception likely results from their examination of the "conflict between the desire of bolstering the benefits of immunity to include protection against the burdens of pretrial proceedings and trial and the desire to meet the ordinary needs of an appeals system built around the final judgment rule." 15A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 3914.10 at 643 (1991 & Supp. 1993). As the Seventh Circuit explained,

> During the appeal memories fade, attorneys' meters tick, judges' schedules become chaotic (to the detriment of litigants in other cases). Plaintiffs' entitlements may be lost or undermined.
>
> Most deferments will be unnecessary. The majority of *Forsyth* appeals – like the bulk of all

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colorable claim is made); *Lanci*, 669 F.2d at 394 (finding that the district court properly proceeded after a filing of notice of appeal because the appeal lacked any "colorable foundation"); *Leppo*, 634 F.2d at 103 (finding frivolity both because the notice of appeal amounted to a trial continuance and because of the merits of the double jeopardy claim asserted).

This Court is troubled by the absence of a clearly identifiable standard of "frivolousness" under the substance test. The standard would seem to require more than that employed in the order appealed from (e.g., defendant's motion to dismiss or summary judgment motion), which considered the claim on the merits and adjudged it lacking (even assuming the plaintiff's version of the facts); otherwise, every denial of such motions would be frivolous and interlocutory appeal would be impossible. But this standard may not need to reach that required for sanctions under Fed. R. Civ. P. 11; none of the cases above discuss sanctions. This Court will not now define the standard for frivolousness under the substance test, but considers it ripe for review by an appellate court.

> appeals – end in affirmance. Defendants may seek to stall because they gain from delay at plaintiffs' expense, an incentive yielding unjustified appeals. Defendants may take *Forsyth* appeals for tactical as well as strategic reasons: disappointed by the denial of a continuance, they may help themselves to a postponement by lodging a notice of appeal. Proceedings masquerading as *Forsyth* appeals but in fact not presenting genuine claims of immunity create still further problems.

Apostol v. Gallion, 870 F.2d 1335, 1339 (7th Cir. 1989) (cited in *Chuman*, 960 F.2d at 105); *see also United States v. Claiborne*, 727 F.2d 842, 850 (9th Cir.), *cert. denied*, 469 U.S. 829 (1984) (cited in *Chuman*, 960 F.2d at 105).

E(3). The Instant Appeal as a Frivolous Appeal.

Here, the Court now makes an explicit finding that the City defendants' claim of qualified immunity is frivolous, under the procedure test.[20]

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[20] The Ninth Circuit has not addressed the exact procedures to be followed by a district court in ascertaining that the issue appealed is frivolous. Specifically, it is not clear (1) when the finding should be made, (2) whether the finding must be made only after hearing, and (3) whether the parties are entitled to briefing or oral argument on the issue of frivolousness. This Court believes that it has complied with necessary procedures.

Timing of Finding of Frivolousness. An explicit finding is not necessary in the order (denying immunity to appellants) appealed from. Under the procedure test, it is the filing of the appeal rather than the merits of the claim appealed that is adjudged frivolous; this determination cannot be made until the

The Court has addressed the City defendants' qualified immunity in its October 21, 1993 Order, and will do

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appeal is filed. Under the substance test, the Court cannot know at the date of entry of that order whether any losing party will appeal, and to require a finding of frivolousness or nonfrivolousness on every order possibly subject to interlocutory appeal would be unduly onerous. Further, a finding of frivolousness may not dissuade a putative appellant intent on delay. Finally, the merits of the issue of immunity having been addressed in the very order appealed from, the putative appellant should have a very good understanding of the court's view on the merits of that issue without an explicit finding of frivolousness or nonfrivolousness. However, a finding of frivolousness should be made soon after filing of the notice of appeal, so as not to let occur the delay that the interlocutory appeal would create, and the frivolous-appeal exception is designed to avoid. Here, the Court makes its finding on November 23, 1993, eight business days after the notices of appeal were filed on November 10, 1993. The Court believes its finding of frivolousness to be timely.

Necessity for Hearing. A hearing on the issue of the frivolousness of the immunity claim is recommended under the procedure test, as a finding of frivolousness is a form of sanction that the appellant should have an opportunity to defend against. (A hearing is not necessary under the substance test, as the court already will have held a hearing when deciding on the issue of immunity in the order appealed from. As the order is one denying dismissal or summary judgment to the defendant claiming immunity, the defendant will have had opportunity to argue the merits of the immunity claim.) In this case, a hearing was held on November 15, 1993, by telephone with all parties' counsel present. At that time the parties were presented with the Court's concern of undue delay caused by the possibility of double interlocutory appeals on the same immunity issue, and were asked to address the issue of consolidated appeals for a hearing one week later. Amended Order Shortening Time at 1-2 (Ct. Rec. 337 in Cause C-89-423-AAM and Ct. Rec. 528 in Cause C-89-425-AAM).

so again on hearing plaintiffs' motion for summary judgment.[21] Theoretically, should the decision on summary judgment deny the City defendants immunity or result in judgment against them, the City defendants could undertake interlocutory appeals from both orders.[22] The result

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Necessity for Briefing and Argument. Under the procedure test, briefing and/or argument is recommended because a finding of frivolousness is a form of sanction. Under the substance test, briefing and argument is not necessary for the reason that the issue of the merits of the immunity claim would have been addressed in the previous hearing. Here, the parties were given briefing opportunity prior to the hearing on November 22, 1993.

[21] It is apparent from the pleadings (City of Spokane Defendants' Response to Court's Amended Order Dated November 15, 1993 at 4-5) as well as the explicit statement of the City defendants' counsel in the November 15, 1993 telephonic conference that the City defendants intend to oppose plaintiffs' summary judgment motion with a claim of a qualified immunity defense.

[22] The recent case of *Nelson v. Silverman*, 999 F.2d 417 (9th Cir. 1993) reaffirms the holding of *Pelletier v. Federal Home Loan Bank*, 968 F.2d 865, 870-71 (9th Cir. 1992) that a defendant may not file multiple pre-trial appeals from denials of qualified immunity motions. "One such interlocutory appeal is all that a government official is entitled to and all that we will entertain." *Nelson*, 999 F.2d at 418. (presumably, it is the putative appellant who should decide when to appeal, when several chances present themselves.) *Nelson*'s application to the instant case is uncertain. *Nelson* may prevent the City defendants here from again appealing the issue of qualified immunity, no matter how the issue arises. On the other hand, *Nelson* may not prevent the City defendants from appealing the issue when it arises under a *grant* of summary judgment to *plaintiffs*. *Mitchell* and subsequent cases, including *Nelson*, that discuss interlocutory appeal of denial of immunity address the issue only in the context of a denial of defendant's motion to dismiss or

for the City defendants would be two pre-trial bites at the appellate apple: the proceedings would be stayed for many months pending resolution of the instant appeal; upon revestiture of jurisdiction, the Court could decide plaintiffs' motion for summary judgment; the proceedings then could be again stayed for months pending resolution of a second appeal; upon revestiture, perhaps years from now, the trial currently set for four months from now might finally occur. This "ping-ponging" between courts contravenes *Silverman*, 999 F.2d at 419, and thwarts the goals of judicial efficiency and speedy resolution of litigation.

Of course, by denying the City defendants a right to appeal now, the Court requires the City defendants to undergo the pretrial proceedings the City defendants believe themselves immune to. However, these proceedings are not unduly burdensome or time-consuming; briefing on plaintiffs' motion for summary judgment is being completed and the hearing already is scheduled. Further, as the City defendants themselves admit that their response to plaintiffs' summary judgment relies on the defense of qualified immunity, the City defendants may be rebriefing to a large extent.

Therefore, upon a balancing of the principle of immunity (as including protection from the burdens of pretrial proceedings and trial) against the final judgment

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defendant's summary judgment motion. It may be that a grant of summary judgment to plaintiffs is a final appeal, not an interlocutory appeal; that distinction may be enough to distinguish *Nelson* and permit defendants here two opportunities to appeal the same issue.

rule (expressing the principles of judicial economy and speedy trial), the Court finds that appeal now is unwarranted and frivolous.

In finding that the appeal is frivolous, the Court is *not* finding that the City defendants or their counsel have acted inappropriately. It finds not that the City defendants intend "ping-ponging," but merely that such a possibility arises when several orders may address the same, appealable issue. In fact, the Court believes that the City defendants' counsel acted appropriately to timely appeal an Order the City defendants believed was decided wrongly. Frivolity is not manifested here by the City defendants' motives, but rather by the strange creature of interlocutory immunity appeal, which creates such a conflict between the principles of immunity and final judgment that learned authorities believe that it "may lead to reconsideration of the basic right to appeal." 15A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 3914.10 at 643 (1991 & Supp. 1993).

This Court has not the authority to resolve completely the conflict presented by immunity appeals. In this case, however, when presented with an appeal of an *order* when the *issue* is not yet final, and when the burden on the putative appellants of waiting until finality (e.g., until after the decision of plaintiffs' motion for summary judgment) is not great, the Court will not stay. The Court will promote judicial efficiency by recognizing appeal

only after all outstanding motions likely concerning the issue to be appealed have been resolved.[23,24]

The alternative to the instant interlocutory appeal is an appeal of both the October 21, 1993 Order and the order on plaintiffs' motion for summary judgment. The Court is sensitive to the City defendants' concern that they had no alternative but to file the instant appeal in order to preserve their right to appeal the October 21, 1993. That concern will be addressed below.

E(4). Timeliness of the City Defendants' Appeal

An appeal of right must be filed within 30 days of the date of entry of the order appealed from. Fed. R. App. P. 4(a)(1). The City defendants filed notices to appeal the Court's October 21, 1993 Order on November 10, 1993. The City defendants' appeal, filed prior to the deadline of November 20, 1993, was therefore timely.

E(5). Extension of Time to Appeal.

However, a district court upon a showing of good cause may extend the time for filing a notice of appeal. Fed. R. App. P. 4(a)(5). A motion requesting an extension

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[23] To preserve the City defendants' appeal rights, appeal of the issue of denial of qualified immunity is proper for the defendants after the decision on plaintiffs' motion for summary judgment, even if that decision does not itself deny qualified immunity.

[24] Several parties have recommended certification of additional issues for appeal. These will be considered if, and when, a nonfrivolous notice of appeal is filed.

must be filed not later than 30 days after the expiration of the otherwise-effective deadline. *Id.* Thus, here the motion must be filed by December 20, 1993. The Court finds that there is good cause to extend the time for filing a notice of appeal, because an extension will permit a party or parties to file a consolidated appeal of both orders deciding the issue of qualified immunity[25,26]. This consolidation will serve the goals of judicial efficiency and speedy resolution of litigation. The Court declares its intent to file its own motion on December 20, 1994, requesting an extension. This motion will be set for hearing without oral argument on January 30, 1994; no briefing is requested.

An extension, if granted, may not exceed 30 days past the otherwise-prescribed deadline or 10 days from the date of entry of the order granting the motion, whichever is later. *Id.* The Court's motion will request an order extending the time for appeal until February 14, 1994.

The Court is aware that Rule 4 does not explicitly anticipate a Court motion to extend the appeal period.

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[25] E.g., the October 21, 1993 Order already appealed from and the order on the plaintiffs' motion for summary judgment, anticipated soon after hearing on January 7, 1993 (reset from December 17, 1993 with this Order).

[26] It may be that an extension is unnecessary to permit consolidation; the Ninth Circuit upon receiving a notice of appeal of the summary judgment order may decide them together. However, an extension will permit a party or parties to file an appeal explicitly consolidating the two orders, thereby clarifying appellants' intent for the Circuit. It may also permit the City to withdraw its instant notices of appeal and refile them later, saving itself the expense of duplicate filing fees.

However, Court motions are permitted by local practice and not excepted by Rule 4. Further, it is appropriate that the Court, with its duty to oversee and articulate justice, seek to administer its proceedings under available procedures that best serve justice. There is no procedural gamesmanship occurring here; the result of the Court's motion is precisely what could occur on a party's own motion. All parties are informed in advance what the result will be, so the appeal period is a definite one, making fair the opportunities for appeal by all parties. Finally and most importantly, as explained below, the orderly and efficient administration of justice necessitates the hearing of the summary judgment motion prior to interlocutory appeal. An extension until February 14, 1994 will permit that hearing without denying the parties their right to appeal the October 21, 1993 Order.

E(6). "New Facts" Raised by the City Defendants

The City defendants in their briefing claim that new facts have arisen since the hearing on November 15, 1993, that make necessary both plaintiffs' amendment of their motion for summary judgment and additional discovery. (City defendants do not seem to claim that the existence of the search warrant should affect the outcome of the instant motion to stay, except as a stay would affect the briefing of plaintiffs' motion for summary judgment.) The "new facts" are the discovery by the 423 plaintiffs' counsel of a search warrant dated June 18, 1986 for a search of 802 S. Thor. This document was filed by affidavit on November 17, 1993.

The Court can appreciate the City defendants' concern that this document may affect the proceedings. However, plaintiffs must stand on their motion as previously filed. (The defendants may discuss the issue of the discovered search warrant, as they wish.) The Court is unwilling to permit additional delay of the hearing of the summary judgment motion.

As to discovery, the Court fully addressed (and denied) requests for additional discovery on October 21, 1993. The existence of the search warrant does not alter the conclusions of that Order.

F. CONCLUSION

The Court declares that the City defendants' interlocutory appeals of November 10, 1993 are frivolous. Therefore, it has jurisdiction over these proceedings.

The Court is aware that the parties may have interrupted the established briefing schedule in order to consider and respond to the instant motion to stay. In order to provide the parties with full opportunity to brief the outstanding motions, the following scheduling changes are made. Hearing on Defendant Erickson's Motion for Clarification of October 21, 1993 Order remains set on November 26, 1993 without oral argument; as clarification of the Court's own order does not require argumentation, briefing is closed. Hearing on Plaintiffs' Motion for Summary Judgment on Commission of Constitutional Violations, and Issue of Liability as to All Individual Defendants is reset from December 17, 1993 to January 7, 1993 without oral argument. The deadline for defendants' response to plaintiffs' Motion, currently November 22,

1993, is extended until December 12, 1993. The deadline for plaintiffs' reply brief, currently December 3, 1993, is extended until December 24, 1993. Hearing on Defendants' Motion to Bifurcate Trial will be set after resolution of Plaintiffs' Motion for Summary Judgment. Additionally, Grabenstein's and Reeves's immunity may be revisited should summary judgment be granted against them. Finally, trial remains set for March 7, 1994. **IT IS HEREBY ORDERED:**

1. City of Spokane Defendants' Motion to Stay Proceedings Pending Appeal is DENIED.

2. "425" Plaintiffs Motion to Certify the City Defendants' Appeal as Waived and Frivolous[27] is GRANTED IN PART.

IT IS SO ORDERED. The Clerk is instructed to enter an Order accordingly and forward copies to counsel. The Clerk is instructed further to attach this Order as an addendum to the certificate of appeal to the Ninth Circuit.

DATED this 23rd day of November, 1993.

/s/ Alan A. McDonald
ALAN A. McDONALD
United States
District Judge

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[27] This motion was submitted on the day of hearing the motion for stay, without notice of hearing. The Court ordinarily would consider the motion as not ripe for hearing, but in that the motion responds to the motion for stay it is adequately addressed by this Order.

APPENDIX D

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

GYPSY CHURCH OF THE NORTHWEST, et al.,	)	No. C-89-425-AAM
	)	No. C-89-423-AAM
Plaintiffs,	)	**ORDER ON SUMMARY JUDGMENT**
v.	)	
SPOKANE COUNTY, et al.,	)	(Filed Jan. 21, 1994)
Defendants.	)	

Before the Court are the "425" Plaintiffs' Motion for Summary Judgment on Commission of Constitutional Violations, and Issue of Liability as to All Individual Defendants, **Ct. Rec. 323** in C-89-423-AAM and **Ct. Rec. 515** in C-89-425-AAM; and the "423" Plaintiffs' Motion for Joinder & Summary Judgment Against All Non-Municipal Defendants for Violations of Constitutional Rights, **Ct. Rec. 327** in C-89-423-AAM and **Ct. Rec. 519** in C-89-425-AAM. The motions were heard without oral argument.

Plaintiffs in Cause No. C-89-423-AAM are represented by Jeffry K. Finer of Finer & Pugsley and Patrick Stiley of Spokane, Washington. Plaintiffs in Cause No. C-89-425-AAM are represented by Terry E. Thomson of Seattle, Washington; and Gregg R. Smith of Spokane, Washington. Defendants Spokane County, Sheriff Larry Erickson, and Rick and Jane Doe Grabenstein are represented by Jerry R. Neal, John Nelson and Lori A. Terry of Preston Thorgrimson Shidler Gates & Ellis, Spokane,

Washington. Defendant City of Spokane and the remaining Defendants are represented by James C. Sloane, Rocco N. Treppiedi, and Jeanie J. Mohler of the Office of the City Attorney, Spokane, Washington.

A. SUMMARY

Summary judgment of liability for constitutional violations is granted in part to the 425 Plaintiffs against defendants Grabenstein, Allen, Clarke, Coker, Ennis, Freeman, Grub, Keane, Krogh, Lavelle, Lindskog, Pavlischak, Poindexter, Poole, Stanley, VanLeuven and Yates. It is denied as to defendants Bailor, Gaunt, Harding, Johnson, Neumiller and Reeve. Liability issues remain as to defendants Bailor, Grub, Harding and Poindexter.

Summary judgment of liability also is granted in part to the 423 Plaintiffs against defendants Allen, Clarke, Ennis, Freeman, Gaunt, Grub, Lindskog, Neumiller, Reeve. It is denied as to defendants Grabenstein, Coker, Harding, Krogh, Pavlischak, Poole, VanLeuven, Weir and Yates. Liability issues remain as to defendants Harding and Lindskog.

B. PARTIES

Plaintiffs in Cause No. C-89-423-AAM are James Senator Marks, II, and Jane Marks, husband and wife; Tommy Marks; David Marks; James Senator Marks, II, as guardian ad litem for the minor children Marie Marks, Michael Marks and Sonny Marks; Linda Marks; and Tina Marks (collectively the "423 Plaintiffs").

Plaintiffs in the consolidated Cause No. C-89-425-AAM are the Gypsy Church of the Northwest, a voluntary association, by and through Grover Marks, Trustee; Grover Marks and Marie Marks, husband and wife; Marguerite Marks; Marguerite Marks as guardian ad litem for the minor child Steven Marks; Robert Marks and Polly Marks, husband and wife; Robert Marks and Polly Marks as guardians ad litem for the minor children Richard Marks, Shirley Marks, Lisa Marks and Steve Marks; Larry Zeko and Laura Zeko, husband and wife; Larry Zeko and Laura Zeko as guardians ad litem for the minor children Robert Zeko, Jason Zeko, Crissie Zeko and Sonny Zeko; Peter Marks; and Peter Marks as guardian ad litem for the minor child Buck Marks (collectively the "425 Plaintiffs").

The 423 Plaintiffs have sued Spokane County; the City of Spokane; Larry Erickson; Richard Grabenstein and Jane Doe Grabenstein, husband and wife; Robert Allen and Jane Doe Allen, husband and wife; John R. Clarke and Jane Doe Clarke, husband and wife; Denise E. Coker and John Doe Coker, wife and husband; Earl L. Ennis and Jane Doe Ennis, husband and wife; Larry Freeman and Jane Doe Freeman, husband and wife; Monte E. Gaunt and Jane Doe Gaunt, husband and wife; William F. Grub and Jane Doe Grub, husband and wife; Clifford Harding; Ken Krogh and Jane Doe Krogh, husband and wife; Larry M. Lindskog and Jane Doe Lindskog, husband and wife; Jack Neumiller and Jane Doe Neumiller, husband and wife; Andrew Pavlischak and Jane Doe Pavlischak, husband and wife; Richard Poole and Jane Doe Poole, husband and wife; Sheldon Reeve and Jane Doe Reeve, husband and wife; Robert VanLeuven and Jane Doe VanLeuven, husband and wife; Ralph Weir and

Jane Doe Weir, husband and wife; and Michael F. Yates and Jane Doe Yates, husband and wife.

The parties to C-89-423-AAM agree that each of the spouses of these defendants should be dismissed.[1] Therefore, **IT IS HEREBY ORDERED** that the following defendants are **DISMISSED WITHOUT PREJUDICE** from C-89-423-AAM: Jane Doe Grabenstein, Jane Doe Allen, Jane Doe Clarke, John Doe Coker, Jane Doe Ennis, Jane Doe Freeman, Jane Doe Gaunt, Jane Doe Grub, Jane Doe Krogh, Jane Doe Lindskog, Jane Doe Neumiller, Jane Doe Pavlischak, Jane Doe Poole, Jane Doe Reeve, Jane Doe VanLeuven, Jane Doe Weir, and Jane Doe Yates.

The 425 Plaintiffs have sued Spokane County; the City of Spokane; Larry Erickson; Richard Grabenstein; Robert Allen; Robert G. Bailor; John R. Clarke; Denise E. Coker; Earl L. Ennis; Larry Freeman; Monte E. Gaunt; William F. Grub; Clifford Harding; Donald E. Johnson; Stephen Keane; Ken Krogh; Michael E. Lavelle; Larry M. Lindskog; Jack Neumiller; Andrew Pavlischak; Gerald Poindexter; Richard Poole; Sheldon Reeve; Nicolis E. Stanley; Robert VanLeuven; and Michael F. Yates.

"Officer Davis" was named as a defendant to C-89-425-AAM, but neither plaintiffs nor defendants have been able to identify such individual.[2] Therefore, **IT IS**

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[1] Joint Statement of Claims and Parties Outstanding in "423" Case, **Ct. Rec. 406** in C-89-423-AAM and **Ct. Rec. 598** in C-89-425-AAM.

[2] Joint Statement of Claims and Parties Outstanding in "425" Case, **Ct. Rec. 404** in C-89-423-AAM and **Ct. Rec. 596** in C-89-425-AAM.

HEREBY ORDERED that Officer Davis is **DISMISSED WITHOUT PREJUDICE** from C-89-425-AAM.

Parties briefing the instant motion are: 423 Plaintiffs; 425 Plaintiffs; Grabenstein, Allen, Bailor, Clarke, Coker, Ennis, Freeman, Gaunt, Grub, Harding, Johnson, Keane, Krogh, Lavelle, Lindskog, Neumiller, Pavlischak, Poindexter, Poole, Reeve, Stanley, VanLeuven, Weir and Yates (collectively "City Defendants"). The liability of defendants Spokane County, City of Spokane and County Sheriff Erickson is not discussed.

C. BACKGROUND

Early events: the burglary investigation. During 1985, the Spokane community was plagued by a rash of residential burglaries. Believing the burglaries to be the work of an organized burglary ring, the Spokane Police Department set up a Burglary Task Force within its Investigative Division. By design, the Task Force worked closely with the Spokane County Prosecuting Attorney's Office, particularly with Deputy Prosecuting Attorney Patricia Thompson.

In late spring of 1986, Spokane County Detective Rick Grabenstein arrested a burglar named Mike White. White, who was linked to seventeen burglaries in the Spokane County, confessed to selling large quantities of stolen properties to "Gypsies" at three locations within the city limits: two residences at 428 and 802 S. Thor, and a used car business located near these residences. The residences belonged to Grover Marks and James Senator Marks, II.

Detective Grabenstein reported this information to the City's Burglary Task Force. The Task Force decided to use White as a "cooperating individual" to gather additional evidence establishing the Marks' involvement in the purchase of stolen property. Since Detective Grabenstein had established a good working rapport with White, the County temporarily assigned him to the City's Task Force to assist in the investigation of the alleged fencing operation.[3]

White, under the direction of the Task Force, made several attempts between June 10 and June 17, 1986, to effectuate undercover sales of stolen property to the residents at 428 S. Thor and 802 S. Thor. Three of the sales were successful. On June 10, 1986, White sold several items of jewelry, which he indicated were stolen, to James Senator Marks II at the 802 S. Thor address. On June 12, 1986, White again sold property which he represented as stolen to James Marks at 802 S. Thor. This transaction was recorded on audio and video tape pursuant to court order. On June 17, 1986, White sold purportedly stolen jewelry and silverware to plaintiff Lippie Marks at the residence located at 428 S. Thor. That purchase was also recorded on audio and video tape pursuant to court order.

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[3] The County asserts that during the short period of time that Grabenstein was working with the Task Force, he was under the supervision of the Spokane Police Department, not the County Sheriff's Office. However, other than the conclusory statements made by Grabenstein and Sheriff Erickson, the County has produced no evidence to support this assertion.

On June 18, 1986, at approximately 11:00 a.m., White attempted to sell more stolen goods at 802 S. Thor, but was refused by plaintiff Jane Marks. Believing the refusal to have resulted from a compromise of the investigation and fearing the destruction or disappearance of evidence, the Task Force immediately sought to obtain search warrants for the residences. This decision was approved by Lieutenant Larry Freeman who was in charge of the Task Force and Captain Robert Allen, the Captain of the Investigative Division. Captain Allen authorized the use of detectives from other units in the Investigative Division, and also obtained permission from the Chief's Office to recruit additional personnel from other divisions in the department.

Lieutenant Freeman, as commander of the Crimes Against Property Unit and supervisor of the Task Force, served as commander of the overall operation. Detective Grabenstein was assigned the position of case manager for the search at the 428 S. Thor residence. City Detective Neumiller was designated case manager for the search at the 802 S. Thor residence. City Detective Andrew Pavlischak, another member of the Task Force, was assigned the role of developing the basic plan for securing the houses and ensuring safety during the searches.

Preparation of search warrant. Detectives Grabenstein and City Detectives Sheldon Reeve and Jack Neumiller were directed to prepare a search warrant. At approximately 11:20 a.m., the trio went to the public safety building to prepare the affidavit and search warrant. The affidavit of probable cause was prepared for Detective Grabenstein's signature since he was the officer who arrested Michael White, investigated the burglaries,

and corroborated other details contained in the affidavit. The officers compiled a list describing the property which White had sold to plaintiffs James and Lippie Marks on June 10, 12, and 17, 1986. At the suggestion of Detective Neumiller, the officers also attached to the affidavit and warrant more than 38 pages of stolen property reports which were prepared by the actual property owners who were previously victimized by White. The inclusion of these lists was based on White's statement that he and his accomplices had sold the stolen property to the residents of these two houses.

According to the defendants, the inclusion of stolen property reports in an affidavit of probable cause was not a practice taught by the police department, but was a standard practice used by Detective Neumiller and other officers. Due to the urgency of obtaining the warrant, the officers did not have time to type in the affidavit and warrant all of the items described in the property lists. They contend that it is an accepted practice among the Spokane County judiciary to accept the property lists contained in police reports of residential burglaries as part of an affidavit of probable cause or search warrant for stolen property. The district court judges recognize the fact that officers would be looking for the additional items that were attached to the search warrant.[4]

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[4] This does indeed appear to be the understanding that Judge Tanksley had of the lists attached to the affidavit and warrant when he signed the warrant later that day. On June 23, 1986, during the hearing on the Gypsies' motion for return of money seized in the search, Judge Tanksley stated:

> I was presented an Affidavit which set forth some rather specific and, quite frankly, well put together

Neumiller left before the warrants were completed. The affidavit and warrant were reviewed by Deputy Prosecuting Attorney Patricia Thompson at approximately 2:45 p.m. Grabenstein then presented the affidavit and warrant to Judge Raymond Tanksley, Spokane County District Court Judge. Judge Tanksley reviewed the affidavit and warrant, asked Detective Grabenstein questions, including a specific question about the stolen property lists, and signed two copies of the warrant. Immediately upon the signing of the warrants, Detective Grabenstein and Detective Reeve drove to the 428 S. Thor residence. Detective Grabenstein got out of the vehicle and Detective Reeve continued on to the 802 S. Thor residence.

Pre-search instructions. During the noon hour, the police conducted a general briefing for those who had been recruited to assist in the search. During the briefing,

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> statements reference [sic] a probable cause in some detail, both affixed to the affidavit and to the search warrant which I signed, are numerous pages of police reports, burglary reports, which set forth in detail items allegedly taken in burglary whereby there was suspicion that some of the loot, or some of the things taken, were in one of these two residences on South Thor, or in some vehicle owned by the defendants adjacent thereto.
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> * * *
>
> [N]obody haw [sic] really challenged that law enforcement people had a search warrant, they were in the two houses legally and properly. There's no question about that. The warrant, in my opinion, was properly issued, executed, with the exception of the money.

Detective Neumiller described the basic property that the two search warrants would seek. (Captain Allen, Lieutenant Freeman, Detective Neumiller and Detective Pavlischak addressed those who were present at the briefing). Since the warrants were not yet completed or signed, the officers were informed that the warrants would be generally seeking items commonly stolen in residential burglaries, consisting mostly of jewelry, silverware, electronic equipment and photography equipment. Following the briefing session, which lasted approximately 30 minutes, the officers were dispatched to a staging area near the two homes where they were to await the delivery of the warrants.

The searches. According to the defendants' representation of the facts, officers began arriving at the residences at approximately 1:00 p.m. Sometime near 2:00 p.m., surveillance crews observed James Marks arrive at his residence at 802 S. Thor, enter the house and come back out with a box that he placed in the trunk of his car. Marks then got in the car and drove away. About this same time, surveillance crews observed a car with several individuals leave Grover Mark's residence at 428 S. Thor. Concerned that evidence was being removed from the house, Lieutenant VanLeuven telephoned Deputy Prosecuting Attorney Patricia Thompson who informed him that the officers could either seek consent from the residents to enter the homes and await the arrival of the warrants, or they could secure the premises from the outside to prevent any ingress or egress.

Both of the cars that were seen leaving the residences were stopped by officers for alleged traffic violations. The car driven by James Marks was stopped by Officer Robert

G. Bailor, allegedly because the car lacked license plates. Officer Lindskog arrived at the scene of the stop immediately thereafter and advised Marks of his constitutional rights. After waiving his rights, Marks consented to the search of his vehicle and signed a consent form to that effect. (The consent form was signed by James Marks at 2:00 p.m.) After the search was completed, Marks voluntarily agreed to return to his home with the officers.

The vehicle which was observed leaving the 428 S. Thor residence was stopped by Officer Weir for an illegal turn or lane change. David Marks, Jane Marks, Laura Zeko and Chrissie Zeko were in the vehicle. The occupants were ordered to return to the house where they would await the search warrant. While defendants maintain that the stop of David Marks' vehicle occurred shortly after 2:00 p.m., David Marks contends that he was stopped sometime around 9:30 a.m. The radio call card from the police dispatcher supposedly indicates that the stop was made at 2:00 p.m. (The call card was not submitted as evidence).

Detective Neumiller, the case manager at the 802 S. Thor residence, states that he arrived at that address at the same time that James Marks and the officers returned (sometime around 2:00 p.m.). Detective Neumiller maintains that he explained to James Marks that the police were in the process of obtaining a search warrant for the house to look for stolen property. He advised Marks of his Constitutional rights at 2:52 p.m. and Marks signed the rights card, indicating he wanted to talk to his attorney. The defendants state that Marks telephoned his

attorney, Robert McGoldrick, and then informed the officers that they were welcome to search the house. Detective Neumiller declined the invitation, and told Marks that they would wait for the arrival of the warrant. Sergeant Ennis, Detective Monte Gaunt and Detective Neumiller waited inside the residence while the other officers were outside establishing a security perimeter.

Defendants claim that upon Detective Reeve's arrival at James Marks' residence at 802 S. Thor, he gave the warrant to Detective Neumiller who in turn gave it to James Marks. Near the beginning of the search, James Marks allegedly walked over to a china hutch, grabbed some items out of a bowl, threw them down on a table, and stated, "These are the items that your blond hair boy sold to us, because he needed gas money. I gave him some money for them." Detective Neumiller recognized the items as those given to White for the undercover sale. The search continued and the officers found some more jewelry in a safe located in the bathroom. Detective Neumiller states in his affidavit that he asked James Marks whether there were any cameras or photographic equipment in the house (this question was posed to Mr. Marks after he had asked to speak to his attorney) and Marks responded that there were not. The officers then found numerous pieces of photography equipment, including cameras, lenses, flash units, etc. Some but not all of the equipment matched the general descriptions of equipment referred to in the warrant.

Later in the afternoon, Marks' attorney, Robert McGoldrick, came to the 802 S. Thor residence. According to the defendants, after reviewing the search warrant, Mr. McGoldrick advised James Marks that he should allow

the search. According to the plaintiffs, Mr. McGoldrick asked to see the warrant but was advised that the warrant was at Grover's house and he would have to go there to read it. When Mr. McGoldrick went to Grover's house, the officers allegedly refused to let him enter or read the warrant.

The search at the 802 S. Thor residence concluded at approximately 7:18 p.m. Before the search was completed, James Marks had left the residence to go to Grover's house.

Detective Grabenstein states by affidavit that he arrived at S. 428 Thor at approximately 3:30 p.m. and delivered a copy of the signed search warrant to Grover Marks. Grover Marks asked Grabenstein to read him the warrant, but Grabenstein refused because he was too busy. Grabenstein told Grover that he could find someone else to read it to him. Grabenstein read Grover Marks his *Miranda* rights and obtained Mr. Mark's signature on the rights card at 3:40 p.m. Only then did the officers begin to search the premises. Because the warrant authorized the search for jewelry and silverware, the officers searched in all places in which such items could be secreted. The officers seized approximately 200 items were seized from 802 S. Thor, and approximately 440 items, including canisters of money, from 428 S. Thor.

During the course of the search, all of the people who were at the South 428 Thor (Grover's) residence were searched, even those who were just visiting. Detective Denise Coker searched all women and children, including a five year old girl and a baby. Much of the operation was videotaped and, interestingly, one of the videotapes

shows a watch removed from Grover Marks which displayed the time as 1:07. (Defendants claim that the watch does not indicate the actual time of search.)

A metal box with more than $20,000 and some jewelry was found in a bedroom at the 428 S. Thor address. Not knowing at that time that additional amounts of money would also be found, the officers merely filmed the box and its contents and returned it to the closet from which it had been retrieved. This box subsequently disappeared. Officer Grub states that he believes he saw David Marks leave the residence with the metal box during the search operation.

A footlocker and several cans of money were subsequently found under a false floor in the 428 S. Thor residence. In total, approximately $1.6 million was discovered at the residence. During the course of the search, the officers made several calls to Lieutenant Freeman (who was back at the police station), seeking advice on what to do with the cash. Initially, Lieutenant Freeman advised them not to seize the cash as it was not included in the warrant and it was not clear whether it could be linked to any illegal activity. As additional amounts were discovered, Lieutenant Freeman telephoned Captain Allen who suggested that the officers contact Deputy Prosecutor Patricia Thompson and Assistant United States Attorney James Crum for legal advice regarding the seizure of the cash. Thompson told the officers that they need not attempt to amend the warrant or seek another warrant, even though the original warrant did not mention cash, because the cash was seized pursuant to the plain view doctrine. AUSA Crum advised the officers to hold the cash for IRS seizure.

Post-search property inventory. Due to the plaintiffs' disruptive conduct[5] which prevented an orderly search of the premises, the Spokane Police Tactical Command (Captain Allen) ordered the property moved to the Public Safety Building where the search was to be completed. The money was transported to the Public Safety Building in an unmarked vehicle by Detective VanLeuven. VanLeuven was accompanied by Grover Marks and Sergeant Yates. James Marks followed in his own vehicle. The jewelry was transported in a vehicle operated by Detective Poole. Detective Grabenstein rode in the vehicle with the jewelry. When he arrived at the Police Station at approximately 8:00 p.m., Detective Grabenstein prepared a search warrant return and inventory, as he was instructed to do. The inventory process was completed around 1:00 a.m. on June 19, 1986. The property sheets prepared by each of the seizing officers were copied and attached to the standard search warrant return, which was given to Mr. Grover Marks. The Internal Revenue Service sent two investigators to the Police Station to observe the counting of the money and to make assessments about the circumstances.

Post-inventory events: IRS seizure. On June 23, 1986, the IRS served a series of liens or notices of seizure on the City of Spokane for the cash that had been seized from Grover's residence. Also on that day, the City was served

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[5] The officers state in their affidavits that one woman threw herself on the floor and complained that she was having some type of attack, while others were screaming and wailing. They state that several members of the Marks family were creating diversions and attempting to hide items and money that had already been found and inventoried.

with a certified copy of a Writ of Garnishment in the amount of $42,864.89 from Spokane County Superior Court File No. 80-2-02048-4. The money, excluding $43,000 for the garnishments, was turned over to the IRS. The $43,000 was deposited in a separate bank account.

The Marks filed a motion for return of the cash. An expedited hearing was conducted on June 23, 1986, before Judge Tanksley, the judge who issued the warrant. Judge Tanksley granted the defendants' motion for return of the property, subject to the IRS notice of seizure. On July 11, 1986, Judge Tanksley ordered the City to pay $42,864.89 into the Court. The City paid that amount on July 31, 1986 and closed the bank account that had held the cash from the search. The remaining balance, $357.79 was turned over to the IRS pursuant to the original notice of levy and seizure.

Post-inventory events: public viewing of property. In July 1986, after consulting with Deputy Prosecutor Thompson and receiving approval from the Chief of Police, but without court order or approval, the Spokane Police Department held a public viewing of the remaining property. The viewing was generally limited to people who could prove that they were the victim of a crime during the last three years that had been reported to a law enforcement agency. Thirty-five people who attended the viewing were able to identify items as their property.

Criminal litigation. In December 1986, the State of Washington brought a criminal action against James Senator Marks, II, Jane Marks, Grover Marks and Marie "Lippie" Marks, charging them with trafficking in stolen goods. In November 1987, Judge Murphy conducted a

hearing on defendants' motion for return of the seized property and ordered the State to return to the defendants all property that had not been identified as stolen. The items that had been characterized as stolen, remained subject to further proceedings in the court.

In May 1988, the Marks moved to dismiss the criminal charges against them and/or to suppress evidence seized during the June 18, 1986 search. After a lengthy evidentiary hearing which was held in June 1988, Spokane Superior Court Judge John A. Schultheis granted the motion and dismissed the action. Judge Schultheis found it impossible to determine in reading the property lists attached to the search warrant either their relevance to or connection with the property to be seized from the residence. He found no reference to the property lists in the search warrants, nor any allegation that identified the defendants as possible suspects in the thefts or burglaries, nor any suggestion that any of these items might have been sold to or by any of the defendants.

Judge Schultheis also found: that there was strong evidence indicating that the search may have begun prior to Judge Tanksley's signing of the warrant at 3:10 p.m.;[6]

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[6] In his Findings of Facts, Judge Schultheis states:

> Although the search warrants were not delivered to the respective homes until approximately 3:30 p.m., and were not signed by Judge Tanksley until approximately 3:10 p.m., a watch is shown in the police videotape made at South 428 Thor. This watch had been removed from the wrist of Grover Marks. The time on the watch shows 1:07. It is very evident from the videotape that the watch is operating. In addition, an ambulance was called, as well as a

that Detective Grabenstein refused to read Grover Marks the warrant even though Mr. Marks stated that he could not read it himself; that the officers refused to allow the Marks' attorney to read the warrant or to confer with his clients; that none of the officers conducting the search (other than Grabenstein) saw a copy of the search warrant either prior to or during the search; that the warrants lacked particularization to such an extent that the officers had no guidelines from which to determine what could or should be seized, thereby giving complete discretion to the individual officers conducting the search; that the officers conducted a general search of the homes as well as of the persons who were present at the residences; and that no inventory of or receipt for any property or money seized was left with the residents at either address. Based on these findings, Judge Schultheis concluded that the searches were violative of the Fourth and Sixth Amendments of the United States Constitution; Article I, Sec. 7 of the Washington State Constitution; and Washington State criminal laws.[7]

Paramedic Squad truck, to the area of the Markses' residences at 2:56 p.m. on June 18, 1986. The ambulance and paramedic units were called to the scene because of apparent fainting and other physical problems experienced by some of the occupants at South 428 Thor during the course of the search. At the hearing, Sgt. Ennis testified that they were called at his order and at his direction after the discovery of the money; this was when the physical problems and disturbances began, and this occurred when the search was nearly completed.

[7] The State appealed the district court's dismissal of the action and its order directing the return of the money, but did

Civil litigation. Plaintiffs instituted the present civil rights actions in June, 1989. On March 30, 1991, Judge McNichols entered an order precluding the defendants from relying on the plain view doctrine to justify the seizure of cash and property not specifically identified in the warrant, because the first element of the doctrine, a lawful initial intrusion, was absent. The judge premised his ruling on the state court's determination that the warrant and resulting searches and seizures were illegal. Judge McNichols expressly adopted the state court ruling through the application of collateral estoppel.

On September 11, 1991, Judge Robert J. McNichols determined that the doctrine of collateral estoppel would also be applied to prevent relitigation of the state court's determination that the plaintiffs' Fourth Amendment rights had been violated by the illegal search of June 18, 1986. Defendants moved for reconsideration of the court's order regarding the collateral estoppel issue, but the motion was denied in November, 1991. The defendants' second motion for reconsideration was likewise dismissed on March 13, 1992. Judge McNichols noted that the state trial court, after conducting a lengthy hearing, determined that the search warrant was overbroad and insufficiently specific and that the defendant officers operated with complete discretion in executing a general search of the plaintiff's home. To refuse application of the

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not appeal the court's ruling on the suppression issue. The Washington Supreme Court reversed the trial court's order of dismissal, reinstated the criminal charges against the defendants and remanded the property matter to the trial court for an evidentiary hearing.

collateral estoppel doctrine under these circumstances would, in the opinion of Judge McNichols, "essentially prevent any state criminal trial findings, no matter how clear, from being used as the basis for offensive collateral estoppel in a subsequent civil action."

In January, 1992, the plaintiffs moved for summary judgment against the defendants on the remaining issues of liability. Two weeks later, both the City and the County defendants also filed motions for summary judgment.[8] For reasons that are not clear from the record, Judge McNichols conducted a hearing on plaintiffs' motion but stayed hearing on the defendants' motions. Judge McNichols denied the plaintiffs' motion for summary judgment against the individual officers. (His ruling is contained in the March 13, 1992 order which also denied

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[8] The defendants' motions for summary judgment sought dismissal of all claims against the County, the City, the individual officers, and Sheriff Erickson. Defendants listed three bases for their motions: (1) the officers were entitled to qualified immunity from suit under § 1983; (2) plaintiffs' alleged injury was not caused by an unconstitutional custom, policy or practice of the City or the County; and (3) there was no evidence that any County defendant's actions were motivated by racial animus.

Defendants' argument with respect to the qualified immunity issue was premised on the assumption that the Court would vacate Judge McNichols' decision on the collateral estoppel issue and revisit questions concerning the legality of the warrant/search. Defendants argued that the information in Grabenstein's affidavit was sufficient to establish probable cause for the issuance of the warrant; that the warrant was sufficiently specific to satisfy 4th Amendment standards; and that the seizure of any items not listed in the warrant was reasonable under the plain view doctrine.

the defendants' second motion for reconsideration of the collateral estoppel decision.) The gist of the plaintiffs' motion was to eliminate qualified immunity as a defense to the civil rights actions against the individual officers. Judge McNichols found that there existed many disputed issues of material fact, including: (1) the degree of each individual defendant's involvement in the searches and seizures, (2) the identities and positions of the official policymakers for the City and County, and (3) the existence or nonexistence of any official or unofficial policies and customs. Judge McNichols concluded that "The court may not substitute for the fact-finder and choose between competing factual scenarios in a summary judgment proceeding. It is not for one man, nor the court in summary judgment proceedings, to decide key issues of vigorously disputed fact such as those here in question."

The plaintiffs moved the court to reconsider its March 13, 1992 decision to the extent it denied summary judgment against the individual defendant officers who participated in the June 18, 1986 search. Because the parties entered into a stipulated settlement agreement, the court never ruled on the plaintiffs' motion for reconsideration or the defendants' motions for summary judgment. These motions came before the Court on August 12, 1993, together with defendants' third motion for reconsideration of Judge McNichols' order which, through the application of the collateral estoppel doctrine, adopted the state court's finding that the plaintiffs' Constitutional rights were violated. On October 21, 1993, the Court granted defendants' motion for reconsideration (thereby vacating that portion of the Court's September 11, 1991

order applying the collateral estoppel doctrine to defendants other than the County and City), granted plaintiffs' motion for reconsideration to a limited extent (thereby setting a rehearing of plaintiffs' motion for summary judgment, and holding that the qualified immunity defense is unavailable to all officers other than Grabenstein and Reeve, whose immunity would be revisited should summary judgment be granted against them), and granted the defendants' claims for summary judgment.

On November 10, 1993, the City defendants filed notices of appeal of the Court's October 21, 1993 Order denying qualified immunity to the individual defendants (with the exception of Grabenstein and Reeve) and denying the defendants' summary judgment motions based on the doctrine of qualified immunity. The City defendants also moved to stay proceedings pending appeal. By order of November 23, 1993, the Court denied the City of Spokane Defendants' Motion to Stay Proceedings Pending Appeal for the reason that the appeals were frivolous. The Court noted that appeal would be proper after a decision on the plaintiffs' motions for summary judgment, e.g., the instant motions.

Trial is set for March 7, 1994.

D. STANDARDS FOR SUMMARY JUDGMENT

Summary judgment is appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law as shown by the pleadings, depositions, affidavits and other records on file. Fed. R. Civ. P. 56(c); *Radobenko v. Automated Equipment Corp.*, 520 F.2d 540, 543 (9th Cir. 1975). The moving party

has the initial burden of proof that no genuine issue of material fact exists. *Program Engineering, Inc. v. Triangle Publications, Inc.*, 634 F.2d 1188, 1192-93 (9th Cir. 1980). Once the moving party meets this burden, the opposing party must show specific facts establishing the existence of a genuine material issue for trial. *Celotex v. Catrett*, 477 U.S. 317, 321-22, 106 S. Ct. 2548, 91 L. Ed. 2d. 265 (1986). The opposing party must state the specific facts which refute the contentions made by the moving party and prove the existence of a genuine material issue; mere speculation or assertion that unresolved factual issues exist will not defeat a motion for summary judgment. Fed. R. Civ. P. 56(e) advisory committee's note; *Keller v. Dravo Corp.*, 441 F.2d 1239, 1245 (5th Cir. 1971), *cert. denied*, 404 U.S. 1017 (1972).

E. EXISTENCE OF GENUINE ISSUES OF MATERIAL FACT

The parties dispute the following:[9]

*Whether the pre-search traffic stops were made on pretext. This is a genuine dispute as to material fact. Whether the officers making the traffic stops committed constitutional violations thereby is left for trial.

*Whether Polly Marks, Lisa Marks and Shirley Marks were confined to their car and the grounds of 428 S. Thor during the search (as plaintiffs contend) or whether they

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[9] The parties' legal conclusions and "argumentative modifiers" within their L.R. 56 statements are disregarded for the purpose of determining the existence of disputed facts.

were merely not permitted to enter 428 S. Thor (as defendants contend). This is a disputed issue of material fact, upon which summary judgment is not appropriate. It is left for trial.

*Whether the search began prior to issuance of the warrants. This is not material, as the Court finds that the warrants were invalid. Similarly, whether the fact that a watch reading "1:07" evidences the time of search is not material.

*Whether Bailor participated in the securing of 428 S. Thor. This is a disputed issue of material fact, left for trial.

*Whether Harding "ratified" the search activities or otherwise made decisions to search and seize. This is a disputed issue of material fact, left for trial.

*Whether Poindexter participated in the search of 428 S. Thor. This is a disputed issue of material fact, left for trial.

*The specific conduct of officers securing and searching the residences (e.g., who did what). The parties do agree (with the exception of Bailor, Harding and Poindexter) which officers participated in the securing and searching activities. Therefore, attaching liability for particular seizures to particular defendants is therefore appropriate only for a damages determination. Therefore, the disputes as to the specific conduct of the officers (except Bailor, Harding and Poindexter) is not material.

*Which plaintiffs resided in and which plaintiffs merely visited the residences. This is not material for

liability; because the warrant was invalid, no search of any person was authorized.

*Whether defendants seized "over 1.6 million in cash" or "$1,579,064.64." This is material only as to damages.

*Whether a certain blanket was a "sacred blanket," whether the Gypsy Church existed as more than a sham, whether defendants damaged objects with religious significance and whether defendants ridiculed plaintiffs' religious beliefs. This is material only as to damages.

*Whether the garnishment of monies was lawful. This is not material; because the warrant was unlawful, the monies were unlawfully seized in the first instance, prior to garnishment. This is material only as to damages.

*Whether the defendants properly inventoried, receipted and returned the property. Because the warrant was unlawful, the property was unlawfully seized in the first instance. This is material only as to damages.

*Whether the defendants refused plaintiffs an opportunity to view their seized goods. This is material only as to damages.

*Whether Stanley is a defendant. This is a dispute as to material fact, but it is not genuine. Stanley *is* a defendant, as all parties admit in their Joint Statements of Claims and Parties Remaining.

F. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The June 18, 1986 search was not a single event. Therefore, the Court examines for constitutional-

ity[10] the separate events constituting the search: the application and affidavit for search warrant[11]; the pre-search instructions; the securing of 428 S. Thor; the securing of 802 S. Thor; the traffic stops; the vehicle searches; the searching of 428 S. Thor; the searching of 802 S. Thor; and the public viewing of the property.

1. The application and affidavit for search warrant. The warrant's validity is tested for probable cause and for sufficient particularity, based on the information available to the officers preparing the affidavit and warrant. Maryland v. Garrison, 480 U.S. 79, 85 (1987) ("The validity of the warrant must be assessed on the basis of the information that the officers disclosed, or had a duty to discover and to disclose, to the issuing Magistrate.") The officers preparing the affidavit and warrant were Grabenstein, Reeve and Neumiller.

1(a). Probable cause. The affidavit includes informants' allegations[12] that they had sold stolen property to

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[10] The Court examines the individual defendants' liability under 42 U.S.C. 1983 for violations of plaintiffs' Fourth and Fourteenth Amendment rights. The Fourteenth Amendment rights at issue are Fourth Amendment rights, but imposed against state and local rather than federal agents. The standards are the same. *Ker v. California*, 374 U.S. 23, 33 (1963) ("the standard of reasonableness is the same under the Fourth and Fourteenth Amendments").

[11] Two warrants were executed in this case, one for 428 S. Thor and one for 802 S. Thor. Except for address and description of the persons to be searched, the warrants were identical. Therefore, the Court will refer to them with the singular "warrant."

[12] Plaintiffs do not question the reliability of these informants. The Court finds that under the totality of the

"Grover," "Tommy," "Gypsies," "Sonny," and "persons associated with residences at S. 428 and S. 802 Thor." The affidavit includes descriptions of controlled sales to "Sonny" at S. 802 Thor and a "female" at S. 428 Thor. The affidavit finally attaches property reports.[13,14,15]

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circumstances test, at least informant White was reliable, for the reasons given by Grabenstein at page 1, paragraph 4 of his Affidavit for Search Warrant.

[13] The affidavit attaches 16 police reports, alleged to be reports of White's burglaries. The affidavit also recites the numbers of 17 police reports documenting White's burglaries. 15 of the 16 attached reports correspond with 15 of the 17 police reports of White's burglaries. The sixteenth attached report is #86023037, which is not in the list of police report numbers arising from White's burglaries. However, as the affidavit alleges #86-23097 to be a burglary of White's, and #86-23097 is not attached, the Court assumes that Grabenstein made a typographical error in substituting #86-23097 for #86-23037. Therefore, *all* of the attached property reports resulted from informant White's burglaries. (Note that prior to signing the warrant, Judge Tanksley asked Grabenstein if the 38 pages attached to the warrant listed property sold to the Markses at the S. Thor residences; Grabenstein answered in the affirmative.)

[14] Note that the related state court proceedings found that there was no connection between these reports and the Markses:

> [I]t is impossible to determine in reading the attached pages [of property reports] of their relevance to or connection with the property to be seized that was set forth in the search warrant itself, nor is any reference made to these pages in the search warrant.
>
> The pages that were attached to the search warrants which listed items of property taken in burglaries and related crimes, did not in any way identify any of the defendants [plaintiffs here] as possible suspects in the burglaries or thefts, nor do they make any suggestion

The resulting warrants authorize searches of (1) S. 802 Thor, all vehicles at S. 802 Thor, and Sonny and all other

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> that any of the items of property might have been sold to any of the defendants.

Memorandum Opinion of 9/14/88 in No. 86-1-01342-4 at 5, 10-11; and

> [I]t is impossible to determine in reading the attached pages [of property reports], either their relevance to or connection with the property to be seized that was set forth in the search warrants themselves, nor is any reference made to these pages in the search warrant, nor is there any allegation that identifies the defendants [plaintiffs here] as possible suspects in the thefts or burglaries, nor any suggestion that any of these items of property might have been sold to or by any of the defendants.

Findings of Fact and Conclusions of Law of 11/18/88 in No. 86-101342-4 at 5. This Court makes a different finding. Because White alleged that he had sold property from his burglaries to Grover and Sonny, property reports from White's burglaries contain lists of property that might be found at Grover and Sonny's residences.

[15] Plaintiffs allege that the burglary reports were stale and that some of the property had been recovered. This Court will not overturn Judge Tanksley's implied finding that the reports were *not* stale unless his decision was clearly erroneous. *United States v. Elliott*, 893 F.2d 220, 222 ("[o]rdinarily a magistrate's determination that sufficient probable cause exists to issue a search warrant will not be overturned unless it is clearly erroneous" or unless a *Franks* error is alleged), *amended, reh'g denied, en banc*, 904 F.2d 25 (9th Cir.) *cert. denied*, 498 U.S. 904 (1990). The decision was not clearly erroneous; the earliest report is only four months old. Regarding recovery of property, there is no evidence that Grabenstein deliberately misled Judge Tanksley by omitting to tell him that some property had been recovered; rather, the probable cause affidavit admits that some

persons at S. 802 Thor; and (2) S. 428 Thor, all vehicles at S. 428 Thor, and any persons at S. 428 Thor.

Probable cause to issue a warrant is unrelated to trial standards such as proof beyond a reasonable doubt or by a preponderance of the evidence. *Illinois v. Gates*, 462 U.S. 213, 235 (1983), *reh'g denied*, 463 U.S. 1237 (1983). The test is the totality of the circumstances. *Illinois*, 462 U.S. at 238 (citing other authority). However, "Where the standard is probable cause, a search or seizure of a person must be supported by probable cause *particularized with respect to that person.*" *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979) (emphasis added).

The affidavit here alleged that Grover and Sonny Marks purchased stolen property while at their residences (and Grover's business). It established probable cause to search 802 S. Thor (Sonny's residence), 428 S. Thor (Grover's residence), Grover Marks, Sonny Marks, and all vehicles on the premises[16] for the property

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of the property had been recovered. *See United States v. Garza*, 980 F.2d 546, 551 (9th Cir. 1992) (only if facts are omitted from a search warrant and "cast doubt on the existence of probable cause" do they rise to the level of misrepresentation). Judge Tanksley's decision as to probable cause of the remaining property was not clearly erroneous; because only *some* of the property had been recovered, there was probable cause to search for *most* of the property. Grabenstein asserts that the officers did not search for the recovered items; this assertion has not been rebutted by plaintiffs.

[16] Because most of the items for which the officers searched were small enough to fit in a car, because Grover and Sonny were suspected of trafficking stolen goods (e.g. selling and/or *transporting* them to others), and because some sales had been made to Grover at Grover's used car lot, there was probable

described by the informants, sold in the controlled sales, or described in the attached property reports.[17] It did *not* establish probable cause to search any other person (except for officer safety).[18]

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cause to search all vehicles on both premises. "All vehicles" includes all vehicles owned or controlled by Sonny or Grover. Because the officers reasonably could suspect Sonny and Grover of using agents to transport goods, "all vehicles" includes all vehicles on the premises that were owned or controlled by other persons on the premises.

[17] It was appropriate for the warrant to authorize search for *all* of the property at *each* house. It is true that the Task Force investigation had focused primarily on Sonny, not Grover Marks, and thus 802 and not 428 S. Thor. However, the affidavit states:

> White also indicated that he had sold property from the burglaries at both houses but does not remember which property he sold at which house. Therefore, it is believed that any of the property might be at either house.

Affidavit for Search Warrant, Exhibit 2 to "425" Plaintiffs' LR 56 Statement of Material Facts in Support of Motion for Summary Judgment Against All Individual Defendants on the Commission of Constitutional Violations, at 3. *See United States v. Hillyard*, 677 F.2d 1336, 1339 (9th Cir. 1982) (where it was reasonable to believe that stolen equipment could be at either or both of two locations, it was proper for magistrate to direct a search of both locations).

[18] Note that the affidavit requested a warrant to search *only* the persons of "James [Sonny] Marks, Grover Marks, and any other person on the premises at the time of warrant execution for officer safety." Affidavit for Search Warrant, attached as Exhibit 2 to "425" Plaintiffs' LR 56 Statement of Material Facts in Support of Motion for Summary Judgment Against All Individual Defendants on the Commission of Constitutional Violations, at 4.

The inquiry for constitutional violations is whether the officers knew or should have known that the affidavit failed to establish probable cause. *Malley v. Briggs*, 475 U.S. 335, 345 (1986) (the inquiry of the warrant applicant is "whether a reasonably well-trained officer in [the applicant]'s position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant. If such was not the case, the officer's application for a warrant was not objectively reasonable . . . ") (footnote omitted); *United States v. Leon*, 468 U.S. 897, 926 ("suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause."), *reh'g denied*, 468 U.S. 1250 (1984).

Here, Reeve should have known that the affidavit did not establish probable cause to search individuals other than Grover and Sonny Marks because the informants' allegations *only* extend specifically to Grover and Sonny; the remaining allegations are to unidentified "Gypsies" and a "female." Grabenstein, as the officer signing the affidavit, apparently *did* know of the limitations on probable cause, because his affidavit only requests a warrant for Grover and Sonny Marks. Therefore, Grabenstein and Reeve could not have harbored an objectively reasonable belief in the existence of probable cause to search any individuals other than Grover and Sonny Marks.

However, prior to search, Grabenstein submitted the affidavit and draft warrant to Spokane County Deputy Prosecutor Patricia Thompson, who approved them. Grabenstein reasonably relied on Thompson's approval. Reeve, who knew Grabenstein had to acquire

Thompson's approval before submitting the warrant to Judge Tanksley, also reasonably relied on Thompson's approval. Further, Grabenstein and Reeve acquired Judge Tanksley's approval of the warrant prior to search. Grabenstein and Reeve reasonably relied on Judge Tanksley's approval, because the warrant was not so obviously invalid that they would doubt the judge's findings of probable cause and specificity. *Leon*, 468 U.S. at 922 n.23 (the inquiry is "whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization"). Therefore, although (1) the law requiring specificity of persons to be searched was clear at the time of search, (2) given Thompson's and Judge Tanksley's approval a reasonable officer could have believed the conduct (of preparing a warrant authorizing search of *any* persons on the premises) was lawful. Grabenstein and Reeve are entitled to qualified immunity on this issue.

1(b). Particularity. The affidavit includes descriptions of hundreds of items of property (mostly jewelry and silverware). Detail of description varies from the detailed – "Black Hills Gold Earrings (Landstrom's)" with detailed drawing; "camera [serial number] B2103134 [brand] Nikon [model] FE-2 Black" – to the more vague – "A gold chain"; "Bottle of Liqueror" [sic] and "3 Quarters." Almost all of the property descriptions are those of their owners, in reporting the property as stolen.

The law is clearly established that warrants must particularly describe the things to be seized. *In re Grand Jury Subpoenas*, 926 F.2d 847 (9th Cir. 1991) ("the warrant must make clear to the executing officer exactly what it is that he or she is authorized to search for and seize.");

United States v. Spilotro, 800 F.2d 959, 963 (9th Cir. 1986) ("The description must be specific enough to enable the person conducting the search reasonably to identify the things authorized to be seized.") (citing *United States v. McClintock*, 748 F.2d 1278, 1282 (9th Cir. 1984, *cert. denied; United States v. Hillyard*, 677 F.2d 1336, 1339 (9th Cir. 1982)); *Guerra v. Sutton*, 783 F.2d 1371, 1375 n.4 (9th Cir. 1986). The degree of required specificity varies:

> The specificity required in a warrant varies depending on the circumstances of the case and the types of items involved. Warrants which describe generic categories of items are not necessarily invalid if a more precise description of the items subject to seizure is not possible. In determining whether a description is sufficiently precise, we have concentrated on one or more of the following: (1) whether probable cause exists to seize all items of a particular type described in the warrant; (2) whether the warrant sets out objective standards by which executing officers can differentiate items subject to seizure from those which are not; and (3) whether the government was able to describe the items more particularly in light of the information available to it at the time the warrant was issued.

Spilotro, 800 F.2d at 963 (internal citations omitted). The first two factors are not relevant here; probable cause did not exist to seize all jewelry, etc.[19], and no "objective standards" were set forth in the warrant. However, the third factor applies; most of the property was described

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[19] Sonny and Grover Marks allegedly bought *many* pieces of stolen jewelry, not *all* jewelry to be found in Spokane.

only in the attached stolen property reports, and the officers cannot be asked to describe property with more specificity than did their owners. However, the fact that the officers used the owners' property description only modifies, not exempts them from, the specificity requirement. Warrants cannot authorize search and seizure of vaguely described items, no matter the origin of the item's description.

Here, most of the property descriptions are particular enough to guide appropriately an executing officer. The exceptions are:

*"All notations, documents, records, including bank statements, deposit slips, and any other documentation pertaining to and as evidence of the crimes being investigated herein," Search Warrant(s) at 3. Executing officers likely could not know at the time of search what financial documents could pertain to sales or purchases of stolen property (including property not listed in the warrant). This description effectively authorizes search and seizure of all financial documents. *See Spilotro*, 800 F.2d at 964 (finding similar description of records overbroad); *United States v. Cardwell*, 680 F.2d 75, 76 (9th Cir. 1982) (same).

*"currency – US – (seven $50 bills/five $20 bills)," Search Warrant(s) at 12; "cash – $450," *id.* at 14; "misc. change," *id.* at 15; "US Currency – $100 bills – $9,700," *id.* at 20; "$100 +/- cash in coins in piggy bank (still have piggy bank)," *id.* at 25; "$10.00 in rolled pennies," *id.* at 31; "money – U.S. currency – dimes (rolled) – $150," *id.* at 39; "money – U.S. currency – quarters $100," *id.*; "fifty cent pieces – $100.00," *id.* at 40; "misc. change," *id.* Money, except rare coins/currency and other collectibles,

cannot be particularized without serial numbers or unique markings.

*"crucifix," Search Warrant at 15; "gold chains – various lengths, styles," *id.* at 16; "unk[nown] number of pieces of silver flatware unk[nown] pattern [value] unk[nown]," *id.*; "New Clothes from my son's room," *id.* at 18; "4 New Shirts," *id.*; "pair of sweats," *id.* at 19; "flash attachment," *id.* at 22; "assorted jewelry," *id.* at 24. These are items that could be found in many residences and require more particularity to identify. The Court does not require a description detailed in every particular, but size, quantity or color indications would better assist executing officers. The Court uses an *In re Grand Jury Subpoenas*-derived test, "would a reasonable officer knowing this description and finding *an* object fitting the description believe that s/he had found *the particular* object to be seized?" The descriptions here fail the test.

The fact that some items in the warrant are sufficiently particularized does not necessarily invalidate the warrant. Under the severance doctrine, "where invalid portions of a warrant may be stricken and the resulting portions held valid, seizures pursuant to the valid portions will be sustained." *Spilotro*, 800 F.2d at 967. However, "[t]he severance doctrine is inapplicable in 'the context of a far more extensive warrant and a far more extensive search, all of which is invalid as too general.' " *U.S. v. Stubbs*, 873 F.2d 210, 212 (9th Cir. 1989) (quoting *Spilotro*, 800 F.2d at 967-68. The Court already has found that the warrant is too general because it encompasses all persons on the premises of 428 and 802, despite the officers's [sic] having probable cause to search only Sonny and Grover Marks. The Court now finds that the

search was too general, because the searching officers relied upon but on [sic] general categories of property, rather than the descriptions in the warrant.[20] Therefore, the warrant is invalid.

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[20] In the related criminal proceedings defendants testified that the object of the search was "jewelry and general results from burglaries"; items related to "trafficking in stolen property. . . . And I didn't articulate in my reports what those items were because I didn't know what they were"; "jewelry and serial-numbered items"; an non-itemized "search"; "jewelry and cash"; "all jewelry items"; and "jewelry, silverware, any other contraband that we would recognize to be stolen." Trial Testimony of Ennis at 419, Yates at 814, Bailor at 467, Gaunt at 578, Stanley at 133, Coker at 1057, and Lindskog at 509, attached as Exhibits 8 (Stanley) and 5 (remaining defendants) to "425" Plaintiffs' LR 56 Statement of Material Facts in Support of Motion for Summary Judgment Against All Individual Defendants on the Commission of Constitutional Violations. Defendants assert that plaintiffs misrepresent their testimony. Defendants instead refer to their affidavits, which do not negate their testimony and in fact indirectly support plaintiffs' contention that this was a general search. *See* Affidavits of Ennis at 2 (the investigations involved "property stolen during burglaries . . . purportedly stolen items of jewelry and other valuables"), Yates at 2 ("The homes were to be searched for evidence of stolen property that had been sold at the locations by a police informant and others"), Bailor at 2 ("stolen property"), Grub (no description of search; Grub apparently was never briefed about the object of search); Stanley at 2 ("the investigation concerned the fencing of stolen property"), Coker at 2 ("we would be looking for items such as jewelry, silverware, and other items which had been stolen"), and Lindskog at 2 (the investigation concerned "the fencing of stolen property"), attached as Exhibits 10, 31, 6, 13, 28, 8 and 21 to City of Spokane Defendants' LR 56(b) Statement of Material Facts with Attachments in Opposition to Plaintiffs' Motions for Summary Judgment against all Individual Defendants.

1(c). Conclusion. Given the warrant's partial lack of probable cause (as to all individuals except Sonny and Grover Marks) and specificity (as to financial documents, money and certain items described above), the warrant is invalid. However, because they reasonably relied upon Thompson's and Judge Tanksley's approval of the affidavit and draft warrant, Grabenstein and Reeve have qualified immunity from liability arising from their application for an invalid warrant.

2. The pre-search instructions. Officers who later searched were informed of the scope of the search in one of three ways. First, Grabenstein and Reeve had seen the completed, signed warrants.[21] Second, some officers (Clarke, Coker, Ennis, Gaunt, Johnson, Keane, Poindexter, and VanLeuven) attended a noon-hour briefing. At that briefing, Allen, Freeman, Neumiller and Pavlischak, who themselves had not seen the warrants, informed the officers present that the warrants would be generally seeking items commonly stolen in residential burglaries, consisting mostly of jewelry, silverware, electronic equipment and photography equipment. The briefing contained

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Defendants summarize their knowledge of the object of the search as "Officers were informed about the *basic type* of property they were to look for . . . " City of Spokane Defendants' LR 56(b) Statement at 7 (emphasis added).

[21] Neumiller assisted early on in the preparation of the affidavit and warrant, but left before they were completed. He was later given a copy of the warrant, but did not read it. The Court previously has found that Grabenstein and Reeve were the *only* officers with knowledge of the contents of the search warrants, and the remaining officers neither knew nor inquired as to the scope of the warrants. 10/21/93 Order at 29.

"general instructions" and that officers were informed only of the "basic type of property they were to look for." City of Spokane Defendants' LR 56(b) Statement of Material Facts with Attachments in Opposition to Plaintiffs' Motions for Summary Judgment against all Individual Defendants, at 7. Third, some officers (Bailor and Coker) received a limited briefing "in the field."[22] (It is not clear from the record whether Yates received briefing at the noon-hour session or in the field.[23]) This limited briefing was for a general search. Finally, some officers (Grub, Harding, Krogh, Lavelle, Lindskog, Poole, and Stanley) received no briefing.[24]

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[22] The understanding of Bailor and Coker regarding the object of the search is set forth in footnote 20, *supra*. Bailor was briefed by Johnson, who had not seen the warrant. Affidavit of Bailor, attached as Exhibit 8 to City of Spokane Defendants' LR 56(b) Statement. Coker attended the noon-hour briefing and also received briefing in the field from an unidentified officer. Affidavit of Coker, attached as Exhibit 9 to City of Spokane Defendants' LR 56(b) Statement.

[23] Yates attests that he "received instructions to assist in security . . . " Affidavit of Yates, attached as Exhibit 31 to City of Spokane Defendants' LR 56(b) Statement.

[24] Grub states without elaboration that he received orders at the staging area prior to 2:00 p.m., e.g. prior to the time the warrants were completed or delivered to the homes. Affidavit of Grub, attached as Exhibit 13 to City of Spokane Defendants' LR 56(b) Statement. Harding states that he was not involved until nearly midnight on June 18, 1986. Affidavit of Harding, attached as Exhibit 15 to City of Spokane Defendants' LR 56(b) Statement. Krogh was not briefed, although he had participated in the earlier investigation. Affidavit of Krogh, attached as Exhibit 19 to City of Spokane Defendants' LR 56(b) Statement. Lavelle "was directed . . . to videotape the searches." Affidavit of Lavelle, attached as Exhibit 20 to City of Spokane

Every officer (except Grabenstein and Reeve) knew from his or her briefing – or lack of briefing – to expect a general and extensive search. Reasonable officers would have known then that they would have to refer to the property descriptions in the warrant to comply with the Fourth Amendment.[25,26] But the defendants did not read

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Defendants' LR 56(b) Statement. Lindskog "was directed to conduct surveillance." Affidavit of Lindskog, attached as Exhibit 25 to City of Spokane Defendants' LR 56(b) Statement. Poole was not briefed, although he had participated in the earlier investigation. Affidavit of Poole, attached as Exhibit 26 to City of Spokane Defendants' LR 56(b) Statement. Stanley had "an understanding the investigation concerned the fencing of stolen property" prior to 2:00 p.m., e.g. prior to the time the warrants were completed or delivered to the homes. Affidavit of Stanley, attached as Exhibit 28 to City of Spokane Defendants' LR 56(b) Statement.

[25] Exceptions to the requirement of a valid warrant exist: consent, plain view, search pursuant to arrest, imminent destruction of evidence, and exigent circumstances. The officers reasonably could have begun the search without a valid warrant *if* these exceptions applied. They did not.

[26] Some defendants argue that they knew that a warrant existed, even if they had not read it. Knowledge of the mere existence of a warrant will not insulate officers from liability for unconstitutional searches or seizures, if they fail to inquire as to the warrant's nature and scope. *Guerra v. Sutton*, 783 F.2d 1371, 1375 (9th Cir. 1986)

Some defendants argue that they did not make decisions as to seizure, rather they brought suspect property to Neumiller or Grabenstein to make a seizure determination. That is not enough; there is no "passing the buck" defense to Fourth Amendment violations, because the law expects *every* police officer to make an independent self-assessment of whether his or her actions are constitutional. Further, the act of looking for suspect property constitutes a search, and taking suspect

the warrants or inquire into their scope. Therefore, as the Court previously has found, qualified immunity does not apply to the defendants (except those who read the warrant, e.g. Grabenstein and Reeve).[27,28] Therefore, because the warrant was invalid, the defendants (other than Grabenstein and Reeve) are liable for *any* conduct violating the plaintiffs' constitutional rights.

Grabenstein and Reeve did read the warrant, and thus have qualified immunity for conduct in reasonable reliance upon it. Therefore, they are liable only for their conduct that was clearly unconstitutional, i.e. conduct no reasonable officer could believe constitutional.

The pre-search instructions themselves caused no constitutional violations.

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property to a reviewing officer constitutes a seizure, even before the reviewing officer decides whether the property can be taken from the premises.

[27] Erickson has not been denied qualified immunity from suit. *See* Order of Clarification of 11/29/93.

[28] Note that the qualified immunity exception to constitutional violations in civil cases parallels the "good faith exception" to suppression hearings in criminal cases. *See Malley v. Briggs*, 475 U.S. 335, 344, 106 S. Ct. 1092 (1986) ("[W]e hold that the same standard of objective reasonableness that we applied in the context of a suppression hearing in *Leon* . . . defines the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest."); *Pierson v. Ray*, 386 U.S. 547, 557 (1967) ("We hold that the defense of good faith and probable cause . . . is also available to [officers] in the action under § 1983 . . . [I]f the jury found that the officers reasonably believed in good faith that the arrest was constitutional, then a verdict for the officers would follow even though the arrest was in fact unconstitutional.").

3. The securing of 428 S. Thor. Several officers did not search the homes, but "secured" them by detaining the occupants and preventing most egress and ingress. Detention constitutes a seizure. *Michigan v. Summers*, 452 U.S. 692, 696 (1981); *Terry v. Ohio*, 392 U.S. 1, 16 (1968). Detention of occupants may be lawful if pursuant to a valid search. *Summers*, 452 U.S. at 704-05. But here, the detention was made pursuant to an invalid warrant. Such seizures (of person) are permitted only if (1) they "constitute . . . limited intrusion on the personal security of those detained," (2) they "are justified by . . . substantial law enforcement interests"[29] and (3) "police have an articulable basis [less than probable cause] for suspecting criminal activity." *Summers*, 452 U.S. at 699. Such is not the case here. While detention might be justified by substantial law enforcement interests (preventing removal of property and disruption of the search), and police might have had an articulable basis for suspecting criminal activity (the suspicion set out in the search warrant affidavit that Grover and Sonny Marks were trafficking in stolen goods; the observation that occupants were removing property from the premises that might be the property for which they would search), but detention for

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[29] By way of example, legitimate law enforcement interests in detention pursuant to a *valid* warrant include (1) "preventing flight in the event that incriminating evidence is found"; (2) "minimizing the risk of harm to the officers"; (3) "the orderly completion of the search," which "may be facilitated if the occupants of the premises are present." *Summers*, 452 U.S. at 702-03.

several hours[30] hardly constituted a "limited intrusion." *Summers* found that "detention represents only an incremental intrusion on personal liberty [only] when the search of a home has been authorized by a valid warrant." 452 U.S. at 703. The detention here was an unlawful intrusion on the occupants' liberty. (Whether Polly Marks, Lisa Marks and Shirley Marks were confined to their car and the grounds of 428 S. Thor during the search (as plaintiffs contend) or whether they were merely not permitted to enter 428 S. Thor (as defendants contend) is a disputed issue of material fact, upon which summary judgment is not appropriate.)

The officers responsible for the detention are liable for the constitutional violation to occupants it represents. They are: Clarke, Grub, Keane, Lindskog, Poindexter and VanLeuven. Whether Bailor participated in the securing of 428 S. Thor is a disputed issue of material fact.

4. The securing of 802 S. Thor. For the same reasons applicable to the securing of 428 S. Thor, any officer who

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[30] An authority favorably quoted by the Court in *Summers* twice mentions the importance of duration of detention as affecting reasonability. 3 W. LaFave, *Search and Seizure* § 9.2, at 36-37 (1978), quoted in *Summers*, 452 U.S. at 700-01 n.12 ("[investigative methods] might cast doubt upon the reasonableness of the detention, however, if their use makes the period of detention unduly long . . . "); LaFave, *id.* at 40, quoted in *Summers, id.* at 701-02 n.14 (the reasonableness of a detention may be determined in part by "whether the police are diligently pursuing a means of investigation which is likely to resolve the matter one way or another very soon. . . . ").

secured 802 S. Thor is liable for the constitutional violation to occupants it represents. They are: Clarke, Grub and Johnson[31].

5. The traffic stop at 428 S. Thor. At least an hour before the warrants were signed, Weir and Grub stopped a vehicle leaving 428 S. Thor that was driven by David Marks and carried Jane Marks, Laura Zeko and Chrissie Zeko. No search or seizure occurred.

Defendants allege, and they are not rebutted, that David Marks' vehicle had made a minor traffic infraction. Plaintiffs apparently believe this is pretext and that the true reason for stopping David Marks was defendants' desire to secure the premises of 428 S. Thor and detain all occupants. Because the material issue of pretext is disputed, summary judgment is inappropriate on the issue of Weir[32] and Grub's liability for the traffic stop of David Marks.

6. The traffic stop at 802 S. Thor. At least an hour before the warrants were signed, Bailor and Lindskog stopped a vehicle leaving 802 S. Thor that was driven by James Marks. They searched the car with James Marks' consent. No property was seized.

Defendants allege, and they are not rebutted, that James Marks' vehicle had no license plates. Plaintiffs apparently believe this is pretext and that the true reason for stopping James Marks was defendants' desire to

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[31] The 423 Plaintiffs do not sue Johnson.

[32] The 425 Plaintiffs do not sue Weir.

secure the premises of 802 S. Thor and detain all occupants. Because the material issue of pretext is disputed, summary judgment is inappropriate on the issue of Bailor[33] and Lindskog's liability for the traffic stop of James Marks and the search of his vehicle.

7. The searching of 428 S. Thor. Under the Fourth Amendment, searches and seizures in private residences are unconstitutional unless performed under a valid warrant. Exceptions to the requirement of a valid warrant exist: consent, plain view, search pursuant to arrest, imminent destruction of evidence, and exigent circumstances. But these exceptions do not apply to the defendants (except perhaps Grabenstein and Reeve, discussed below). There were no arrests, so no lawful searches pursuant to arrest; there was no indication of imminent destruction of evidence, given that the residence already was secured; there were no exigent circumstances because there was no actual, reasonable belief in an emergency. There was no consent; Grover Marks's "invitation" appears to be a taunt rather than an intentional relinquishment of a known right. (The defendants must have recognized this, as they state they waited until the warrant arrived before they began the search.) Finally, the plain view doctrine does not apply, because the officers were not validly on the premises.[34] *Horton v. California*, 496 U.S. 128, 136-37 (1990). Therefore, any officer who searched the premises of 428 S. Thor, or seized property

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[33] The 423 Plaintiffs do not sue Bailor.

[34] The Court will not address the moot question of whether the plain view doctrine is inapplicable under the law of the case, e.g., Judge McNichol's March 30, 1991 order.

from the premises, violated plaintiffs' constitutional rights. (The specific conduct of some searching defendants, e.g. who took what, is disputed, but this is not a material dispute because *any* search conduct was unconstitutional. Specific conduct determinations are appropriate only for a determination of damages, not liability.)

Officers who participated in the unlawful search and seizure at 428 S. Thor and their undisputed unconstitutional activities[35] are: Allen (who was involved in the pre-search briefing and assisted in the decision regarding the seizure of cash, although he was not physically present at 428 S. Thor); Coker (who searched the persons of some plaintiffs at 428 S. Thor); Ennis (who was the field supervisor for both searches); Freeman (who was involved in the pre-search briefing and assisted in the decision regarding the seizure of cash, although he was not physically present at 428 S. Thor); Krogh (who searched 428 S. Thor and the persons of David Marks, Pete Marks, and Bobby Marks); Lavelle (who videotaped the search)[36]; Pavlischak (who instructed officers at 428 S. Thor to seize the cash); Poole (who searched 428 S. Thor); Stanley (who

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[35] Again, the Court is not providing an exhaustive list of the conduct of each individual. Some of the plaintiffs' allegations of conduct are disputed, and many are not alleged of specific individuals. Rather, the Court determines that these defendants committed unconstitutional acts by at least the listed conduct.

[36] Videotaping constitutes a search. *United States v. Taketa*, 923 F.2d 665, 675-76 (9th Cir. 1991) ("The videotaping was a continuous search of anyone who entered the camera's field of vision"), citing *United States v. Cuevas-Sanchez*, 821 F.2d 248, 251 (5th Cir. 1987) (video surveillance is a fourth amendment search).

searched 428 S. Thor); and Yates (who searched 428 S. Thor). Whether Poindexter participated in the search of 428 S. Thor is a disputed issue of material fact.

As to Grabenstein and Reeve, they are liable only for their conduct that was clearly unconstitutional. Reeve was not present at 428 S. Thor and so did not search or seize. Grabenstein was present and acted as "case manager." Grabenstein admits that he obtained only two copies of the warrant, one of which he gave to Reeve to use at 802 S. Thor and one which he gave to Grover Marks immediately upon his (Grabenstein's) arrival at 428 S. Thor. Grabenstein also admits that he participated in the search of the premises and seized property from Grover Marks. But a reasonable officer would not rely upon his memory of a 40-page search warrant containing hundreds of property descriptions; a reasonable officer would know that s/he had to refer to the search warrant as s/he was searching.[37] By abandoning the warrant immediately upon entry, Grabenstein in effect reduced

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[37] The Court could make exception for Grabenstein's seizure of particularly memorable items, such as the Queen's Lace silverware, but Grabenstein seized a watch and two rings, which are among multiple jewelry descriptions in the warrant. Without reference to the warrant, Grabenstein could not have known that the jewelry he was seizing in fact was described in the warrant.

The Court does *not* hold that in all searches, searchers must continually reference the search warrant. A search for few, memorable, or a general class of objects (when allowable) would permit a searcher to know the specific item(s) for which s/he searches without reference to the warrant. Here, however, the warrant listed so many items of property that constant reference to it was required to prevent a general search.

himself to the circumstances of his fellow officers, who had not ever seen the warrant. Because his conduct in searching and seizing without reference to the warrant was unreasonable, Grabenstein is liable for his search at 428 S. Thor despite his qualified immunity.

8. The searching of 802 S. Thor. For the same reasons applicable to the searching of 428 S. Thor, any officer who searched the premises of 802 S. Thor, or seized property from the premises, violated plaintiffs' constitutional rights. These officers are Allen (who was involved in the pre-search briefing and assisted in the decision regarding the seizure of cash, although he was not physically present at 802 S. Thor); Bailor[38] (who searched 802 S. Thor); Ennis (who was the field supervisor for both searches); Freeman (who was involved in the pre-search briefing and assisted in the decision regarding the seizure of cash, although he was not physically present at 802 S. Thor); Gaunt (who searched 802 S. Thor); Johnson[39] (who searched 802 S. Thor); Lavelle.[40] (who videotaped the search); Lindskog (who searched 802 S. Thor); and Neumiller (who was the case manager at 802 S. Thor)[41].

As to Grabenstein and Reeve, they are liable only for their conduct that was clearly unconstitutional. Grabenstein was not present at 802 S. Thor and so did not search

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[38] The 423 Plaintiffs do not sue Bailor.

[39] The 423 Plaintiffs do not sue Johnson.

[40] The 423 Plaintiffs do not sue Lavelle.

[41] Note that Neumiller had a copy of the warrant and had assisted in its preparation prior to search. However, he does not have qualified immunity because he never read the completed warrant.

or seize. Reeve was present and searched 802 S. Thor. However, Reeve gave his only copy of the warrant to Neumiller upon his arrival. Like Grabenstein, Reeve in effect reduced himself to the circumstances of his fellow officers, who had not ever seen the warrant. Because his conduct in searching and seizing without reference to the warrant was unreasonable, Reeve is liable for his search at 802 S. Thor despite his qualified immunity.

9. The public viewing of the property. Once the property was (illegally) seized from the homes on June 18, 1986, there were no further Fourth Amendment violations. The property already had been seized from the plaintiffs; public viewing, garnishment, etc. may have moved the property but did not re-seize it. Injury allegedly caused by events after the searches goes to the issue of damages and not liability.

G. CONCLUSION

In hindsight, we can understand how constitutional rights violations developed from what seemed to be a routine application to search. The hard-won warrant was quickly forgotten in a frenzy of unguided seizure. The events of June 18, 1986 fed upon themselves, ending out of proportion to the warrant's purpose and certainly to the rights of the citizens involved.

Understanding that process cannot excuse it. Our constitution was forged in troubled times. It established principles intended to prevail during chaos as well as calm. The very few dark pages in the history of our country's high regard for individual rights have been written with the ink of exigency. If the protection of our

constitution is to mean anything, it must extend to the least privileged among us, who are brushed aside by others' rush to do justice.

IT IS HEREBY ORDERED:

1. "425" Plaintiffs' Motion for Summary Judgment on Commission of Constitutional Violations, and Issue of Liability as to All Individual Defendants is **GRANTED IN PART** (to establish liability of defendants Grabenstein, Allen, Clarke, Coker, Ennis, Freeman, Grub, Keane, Krogh, Lavelle, Lindskog, Pavlischak, Poindexter, Poole, Stanley, VanLeuven and Yates) and **DENIED IN PART** (not establishing liability of defendants Bailor, Gaunt, Harding, Johnson, Neumiller and Reeve).

2. "423" Plaintiffs' Motion for Joinder & Summary Judgment Against All Non-Municipal Defendants for Violations of Constitutional Rights is **GRANTED IN PART** (to establish liability of defendants Allen, Clarke, Ennis, Freeman, Gaunt, Grub, Lindskog, Neumiller, Reeve) and **DENIED IN PART** (not establishing liability of defendants Grabenstein, Coker, Harding, Krogh, Pavlischak, Poole, VanLeuven, Weir and Yates).

This order only establishes defendants' liability. The damages plaintiffs suffered (and those issues of liability that were disputed and so not decided here[42]) will be determined at trial.

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[42] I.e., whether the pre-search traffic stops were made on pretext and whether they were constitutional; whether Polly Marks, Lisa Marks and Shirley Marks were confined to their car and the grounds of 428 S. Thor during the search; whether Bailor participated in the securing of 428 S. Thor; whether Harding "ratified" the search activities or otherwise made

IT IS SO ORDERED. The Clerk is instructed to enter this Order accordingly and forward copies to counsel.

DATED this 26 day of January, 1994.

/s/ Alan A. McDonald
ALAN A. McDONALD
United States
District Judge

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decisions to search and seize; and whether Poindexter participated in the search of 428 S. Thor.

APPENDIX E

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

GYPSY CHURCH OF THE NORTHWEST, et al.,	)	No. C-89-425-AAM
Plaintiffs,	)	No. C-89-423-AAM
v.	)	**ORDER ON MOTIONS FOR RECONSIDERATION**
SPOKANE COUNTY, et al.,	)	
Defendants.	)	(Filed Mar. 7, 1994)

Before the Court are four motions for reconsideration of the Court's Order on Summary Judgment, Ct. Rec. 424 in C-89-423-AAM and Ct. Rec. 616 in C-89-425-AAM. The instant motions are: "423" Plaintiffs' Motion for Reconsideration or Modification of the Judgment, **Ct. Rec. 426** in C-89-423-AAM and **Ct. Rec. 618** in C-89-425-AAM; "425" Plaintiffs' Motion for Reconsideration, implied by "425" Plaintiffs' Memorandum (i) In Opposition to Defendants' Motions for Reconsideration of January 21, 1994 Summary Judgment Order, and (ii) In Support of Cross-Motion for Reconsideration of Court's Establishment of a Limited Qualified Immunity for Defendants Grabenstein and Reeve, **Ct. Rec. 435** in C-89-423-AAM and **Ct. Rec. 627** in C-89-425-AAM; City Defendants' Motion for Reconsideration and Clarification of Order on Summary Judgment, **Ct. Rec. 427** in C-89-423-AAM and **Ct. Rec. 619** in C-89-425-AAM; and Rick Grabenstein's Motion to Reconsider Denial of Qualified Immunity, **Ct. Rec. 429** in C-89-423-AAM and **Ct. Rec. 621** in C-89-425-AAM. The motions were heard without oral argument. Plaintiffs in

Cause No. C-89-423-AAM are represented by Jeffry K. Finer of Finer & Pugsley and Patrick Stiley of Spokane, Washington. Plaintiffs in Cause No. C-89-425-AAM are represented by Terry E. Thomson and Mark D. Deife of Sylvester Ruud Petrie & Cruzen, Seattle, Washington; and Gregg R. Smith of Spokane, Washington. Defendants Spokane County, Sheriff Larry Erickson, and Rick Grabenstein ("County Defendants") are represented by Jerry R. Neal, John Nelson and Lori A. Terry of Preston Thorgrimson Shidler Gates & Ellis, Spokane, Washington. Defendant City of Spokane and the remaining Defendants ("City of Spokane Defendants") are represented by James C. Sloane, Rocco N. Treppiedi, and Jeanie J. Mohler of the Office of the City Attorney, Spokane, Washington. For the reasons set out below, the Court grants in part and denies in part the reconsideration motions.

A. BACKGROUND

On January 21, 1994, the Court entered its Order on Summary Judgment.

The Court dismissed the spouses of the 423 defendants by consent of the parties. The Court also dismissed 425 defendant "Officer Davis" by consent of the parties. The Court refused to dismiss Stanley, finding that the parties agreed he was a defendant.

The Court granted summary judgment of liability for constitutional violations to the 425 Plaintiffs against defendants Grabenstein, Allen, Clarke, Coker, Ennis, Freeman, Grub, Keane, Krogh, Lavelle, Lindskog, Pavlischak, Poindexter, Poole, Stanley, VanLeuven and Yates; and to the 423 Plaintiffs against defendants Allen,

Clarke, Ennis, Freeman, Gaunt, Grub, Lindskog, Neumiller, Reeve.

The Court denied summary judgment of liability for constitutional violations to the 425 Plaintiffs against defendants Bailor, Gaunt, Harding, Johnson, Neumiller and Reeve; and to the 423 Plaintiffs against defendants Grabenstein, Coker, Harding, Krogh, Pavlischak, Poole, VanLeuven, Weir and Yates.

The Court found that liability issues remain with regard to constitutional violations against the 425 Plaintiffs by defendants Bailor, Grub, Harding and Poindexter; and against the 423 Plaintiffs by defendants Harding and Lindskog.

The liability of defendants Spokane County, City of Spokane and County Sheriff Erickson was not discussed.

B. STANDARDS FOR RECONSIDERATION AND CLARIFICATION

"A district court may reconsider its grant of summary judgment under either Federal Rule of Civil Procedure 59(e) (motion to alter or amend a judgment) or Rule 60(b) (relief from judgment)." *School Dist. No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1262 (9th Cir. 1993).

Under Rule 59(e),

> Reconsideration is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law. There

> may also be other, highly unusual, circumstances warranting reconsideration.

School Dist. No. 1J, 5 F.3d at 1263 (citing other authority). (Rule 60(b) is inapplicable, as the Order on Summary Judgment is not a final judgment.)

Some Court errors or ambiguities should be resolved by clarification under Fed. R. Civ. P. 60(a), rather than reconsideration. "Rule 60(a) allows correction of clerical mistakes, even those not committed by the clerk." *Jones & Guerrero Co. v. Sealift Pacific*, 650 F.2d 1072, 1074 (9th Cir. 1981) (citing *Pattiz v. Schwartz*, 386 F.2d 300, 303 (8th Cir. 1968)). When an order omits to address an issue intended to be addressed, "[t]he rule may be used to make an order reflect the actual intentions of the court, plus necessary implications." *Jones & Guerrero*, 650 F.2d at 1074 (citing *Huey v. Teledyne, Inc.*, 608 F.2d 1234, 1236-37 (9th Cir. 1979)).

C. 423 PLAINTIFFS' MOTION FOR RECONSIDERATION

423 Plaintiffs move that seven defendants not held liable to them be found liable. They argue that the Court reasonably separated defendants into groups according to the defendants' activities at the two houses. However, the Court unreasonably separated plaintiffs into two groups, the 423 Plaintiffs at S. 802 Thor and the 425 Plaintiffs at S. 428 Thor. 423 Plaintiffs contend that defendants Coker, Grabenstein, Krogh, Pavlischak, Poole, Vanleuven and Yates, though free of any liability for events at

S. 802 Thor, were complicit in the constitutional deprivations occurring against the 423 Plaintiffs (by searches of their persons or property) at S. 428 Thor.

The City of Spokane Defendants object, contending that the 423 Plaintiffs do not have standing to seek reconsideration of an order on 425 Plaintiffs' liability allegations. They also contend that the Court properly denied summary judgment of liability of Coker, Krogh, Pavlischak, Poole, Vanleuven and Yates to Linda and Marie Marks, because those six defendants had no contact with those two plaintiffs. They also contend that the Court properly denied summary judgment of liability of Coker, Krogh, Pavlischak, Poole, Vanleuven and Yates to James, David and Michael Marks because these three plaintiffs were not searched by these six defendants. Finally, they contend that the mere fact that a defendant was present during an invalid search does not establish the liability of that defendant.

Grabenstein objects, contending that the mere fact that a particular defendant and a particular plaintiff (or his or her property) were both present at S. 428 Thor does not prove that the defendant proximately caused a deprivation of that plaintiff's constitutional rights. Because proximate cause must be established as to each defendant before liability can attach, the 423 Plaintiffs cannot be granted summary judgment of liability against Grabenstein (or, impliedly, against several other defendants).

The Court finds as follows.

The 423 Plaintiffs have standing to challenge the findings of liability as to them, notwithstanding that their claims of liability as to events at S. 428 Thor largely are

incorporations of 425 Plaintiffs' allegations of events. 423 Plaintiffs' allegations of constitutional rights deprivations were set out in their own pleadings.[1]

Defendants' contention that the mere fact that a defendant was present during an invalid search does not establish the liability of that defendant does not apply where, as here, the defendant has been denied qualified immunity. Each of the individual defendants (except Grabenstein and Reeve) entered or searched plaintiffs' property without reference to the warrant, when no reasonable officer knowing of the expected breadth of search (as did these defendants) would have entered or searched. Therefore, the mere presence of these defendants during the invalid search (which the defendants should have known was invalid) *does* establish their liability. Whether particular plaintiffs lived in the house (or were merely visiting) and the degree to which their persons or property were searched are relevant only to the plaintiffs' damages, not liability.

The Court particularized which defendants were liable to plaintiffs. However, the Court omitted to specify to *which plaintiffs* the defendants were liable. This omission is remediable by clarification under Fed. R. Civ. P. 60(a) (rather than reconsideration).

Defendants are liable for the invalid search to those 423 plaintiffs present at the time of search of S. 802 Thor:

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[1] *See, e.g.*, "423" Plaintiffs' LR 56 Statement of Material Facts in Support of Motion for Summary Judgment Against All Non-Municipal Defendants, Ct. Rec. 330 in C-89-423-AAM and Ct. Rec. 522 in C-89-425-AAM, at 1.

James, Jane, David, Michael and Sonny Marks.[2] (Similarly, defendants are liable for the invalid search to those 425 plaintiffs present at the time of search of S. 428 Thor: Grover, Marie, Marguerite, Steven, Robert, Polly, Richard and Steve Marks; Laura, Robert, Jason, Crissie and Sonny Zeko; Peter and Buck Marks.[3]) Defendants also are liable

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[2] City of Spokane Defendants admit that James, Jane, David, Michael and Sonny Marks were present at S. 802 Thor during the search there. City of Spokane Defendants' LR 56(b) Statement of Material Facts with Attachments in Opposition to Plaintiffs' Motions for Summary Judgment against all Individual Defendants, Ct. Rec. 380 in C-89-423-AAM and Ct. Rec. 573 in C-89-425-AAM, at 20 (admitting presence of these plaintiffs at the search). Rick Grabenstein does not deny 423 Plaintiffs' allegations of presence at the search. *See* Defendants' Joint LR 56(a) Statement of Facts with Attachments in Support of Defendants' Renewed Motions for Summary Judgment, Ct. Rec. 265 in C-89-423-AAM, incorporated by reference into Rick Grabenstein's Supplemental LR 56(b) Statement, Ct. Rec. 377 in C-89-423-AAM and Ct. Rec. 570 in C-89-425-AAM. Therefore, plaintiffs' allegations are deemed admitted under L.R. 56(c).

No party contends that Tommy, Marie, Linda or Tina Marks was present at S. 802 Thor during the search there.

[3] City of Spokane Defendants admit that Grover, Marie, Marguerite, Steven, Robert, Polly, Richard and Steve Marks; Laura, Robert, Jason, Crissie and Sonny Zeko; Peter and Buck Marks were present at S. 428 Thor during the search there. City of Spokane Defendants' LR 56(b) Statement of Material Facts with Attachments in Opposition to Plaintiffs' Motions for Summary Judgment against all Individual Defendants, at 8-9, 40-41, 48 (not denying presence of these plaintiffs at the search). Rick Grabenstein does not deny 423 Plaintiffs' allegations of presence at the search. *See* Defendants' Joint LR 56(a) Statement of Facts with Attachments in Support of Defendants' Renewed Motions for Summary Judgment.

for the invalid search to those 423 plaintiffs present during part of the search of S. 428 Thor: James, Jane, Michael, Sonny and David Marks[4]; however, a determination of what defendants were present during their visit could not be made on summary judgment and is left for trial[5]. (425

No party contends that Larry Zeko was present at S. 428 Thor during the search there. Whether Shirley or Lisa Marks was confined to the grounds of S. 428 Thor during the search there is in dispute.

[4] City of Spokane Defendants admit that James, Jane, Michael, Sonny and David Marks were present at S. 428 Thor during part of the search there. City of Spokane Defendants' Memorandum in Opposition to "423" Plaintiffs' Motion for Reconsideration, Ct. Rec. 458 in C-89-423-AAM and Ct. Rec. 629 in C-89-425-AAM, at 3 ("Of the *nine* '423' plaintiffs remaining, . . . *one* was an infant child (Sonny Marks) inside the 428 S. Thor residence and the other *four* were present, at one time or another, inside the 428 home"); City of Spokane Defendants' LR 56(b) Statement of Material Facts with Attachments in Opposition to Plaintiffs' Motions for Summary Judgment against all Individual Defendants, at 20 (admitting presence of these plaintiffs at the search). Rick Grabenstein does not deny 423 Plaintiffs' allegations of presence at the search. *See* Defendants' Joint LR 56(a) Statement of Facts with Attachments in Support of Defendants' Renewed Motions for Summary Judgment.

No party contends that Tommy or Tina Marks was present at S. 428 Thor during any of the search there. 423 Plaintiffs now contend that Marie and Linda Marks were "restrained" outside S. 428 Thor during the search there. "423" Plaintiffs' Motion for Reconsideration or Modification of the Judgment, at 3. However, this is a new allegation not made in their Amended Complaint or motion for summary judgment.

[5] Exception is made for defendant Coker, whom defendants admit searched Jane Marks. City of Spokane Defendants' Memorandum in Opposition to "423" Plaintiffs' Motion for Reconsideration, at 3; City of Spokane Defendants' LR 56(b)

plaintiffs do not allege that defendants are liable to them for the search at S. 802 Thor.[6]) Whether defendants are liable to plaintiffs who were not present at a house at the time of search[7] is a question for trial. (Defendants will be liable to plaintiffs whose property they illegally seized, but property seizure determinations involved disputed issues of material fact inappropriate for summary judgment.) Therefore, **IT IS HEREBY ORDERED** that the Court **AMENDS** its Order on Summary Judgment to read at page 2, lines 7-19:

> Summary judgment of liability for constitutional violations is granted in part to each of the 425 Plaintiffs present at S. 428 Thor (Grover, Marie, Marguerite, Steven, Robert, Polly, Richard and Steve Marks; Laura, Robert, Jason, Crissie and Sonny Zeko; Peter and Buck Marks) against each of the defendants participating in the search at S. 428 Thor (Grabenstein, Allen,

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Statement of Material Facts with Attachments in Opposition to Plaintiffs' Motions for Summary Judgment against all Individual Defendants, at 7-8 (justifying but not denying Coker's search of women and children). Rick Grabenstein does not deny 423 Plaintiffs' allegations. *See* Defendants' Joint LR 56(a) Statement of Facts with Attachments in Support of Defendants' Renewed Motions for Summary Judgment.

[6] *See* "425" Plaintiffs' LR 56 Statement of Material Facts in Support of Motion for Summary Judgment Against All Individual Defendants on the Commission of Constitutional Violations, Ct. Rec. 326 in C-89-423-AAM and Ct. Rec. 518 in C-89-425-AAM, at 2 ("the '425' case pertains to the police raid on Grover Marks' home at 428 S. Thor . . . ").

[7] E.g., 423 Plaintiffs Tommy, Marie, Linda or Tina Marks at S. 802 Thor; 423 Plaintiffs Tommy, Marie, Linda or Tina Marks at S. 428 Thor; 425 Plaintiffs Shirley or Lisa Marks, or Larry Zeko at S. 428 Thor.

Clarke, Coker, Ennis, Freeman, Grub, Keane, Krogh, Lavelle, Lindskog, Pavlischak, Poindexter, Poole, Stanley, VanLeuven and Yates). It is denied to these plaintiffs against defendants not participating in the search (Bailor, Gaunt, Harding, Johnson, Neumiller and Reeve); these liability issues remain. Liability issues remain as described *infra* as to each of these plaintiffs against each of Bailor, Harding and Poindexter; as to each of Laura and Crissie Zeko against Grub; and as to Polly, Lisa and Shirley Marks against Grabenstein, Allen, Clarke, Coker, Ennis, Freeman, Grub, Keane, Krogh, Lavelle, Lindskog, Pavlischak, Poindexter, Poole, Stanley, VanLeuven and Yates. Liability issues remain as to all individual 425 defendants to the 425 Plaintiffs not proved present at S. 428 Thor (Gypsy Church of the Northwest, Shirley and Lisa Marks and Larry Zeko).

Summary judgment of liability also is granted in part to each of the 423 Plaintiffs present at S. 802 Thor (James, Jane, David, Michael and Sonny Marks) against each of the defendants participating in the search at S. 802 Thor (Allen, Clarke, Ennis, Freeman, Gaunt, Grub, Lindskog, Neumiller and Reeve). It is denied to these plaintiffs against defendants not participating in the search (Grabenstein, Coker, Harding, Krogh, Pavlischak, Poole, VanLeuven, Weir and Yates); these liability issues remain. Liability issues remain as described *infra* as to each of these plaintiffs against Harding; and James Marks against Lindskog. Liability issues remain as to each of the 423 Plaintiffs present at S. 428 Thor during the search there (James, Jane, Michael, Sonny and David Marks) against each of the 423 defendants participating in the search of S. 428

Thor during these plaintiffs' visit to S. 428 Thor (unknown among Allen, Coker, Ennis, Freeman, Grabenstein, Krogh, Pavlischak, Poole and Yates). Summary judgment of liability also is granted in part to Jane Marks against Coker. Liability issues remain as to all individual 423 defendants to the 423 Plaintiffs not proved present at S. 802 Thor (Tommy, Marie, Linda and Tina Marks). Liability issues remain as to all individual 423 defendants participating in the search of S. 428 Thor (Allen, Coker, Ennis, Freeman, Grabenstein, Krogh, Pavlischak, Poole and Yates) to the 425 Plaintiffs not proved present at S. 428 Thor (Tommy, Marie, Linda and Tina Marks).

IT IS FURTHER ORDERED that "423" Plaintiffs' Motion for Reconsideration or Modification of the Judgment is **GRANTED IN PART** (to the extent of this amendment) and **DENIED IN PART** (as to all other requested reconsideration or clarification).

D. 425 PLAINTIFFS' MOTION FOR RECONSIDERATION

425 Plaintiffs move that the Court reverse its grant of limited qualified immunity to Grabenstein and Reeve. 425 Plaintiffs contend that because Grabenstein and Reeve knew the warrants were overly broad, they cannot have qualified immunity by virtue of the prosecutor and magistrate's approval of the warrants. 425 Plaintiffs' motion is denied for three reasons.

First, 425 Plaintiffs' motion is untimely. Reconsideration motions must be filed within ten days of the order to be reconsidered. Fed. R. Civ. P. 59(e); *Northern Cheyenne*

Tribe v. Hodel, 851 F.2d 1152, 1155 (9th Cir. 1988) ("We strictly construe rule 59(e)'s ten-day limitation."). The Order on Summary Judgment was entered January 21, 1994; 425 Plaintiffs' motion, filed February 9, 1994, is untimely by two days.[8]

Second, 425 Plaintiffs fail to comply with L.R. 7(b), which requires a written motion. 425 Plaintiffs have filed only a memorandum in support of their implied motion.

Third, 425 Pla iffs have not demonstrated clear error or other cause for reconsideration. The Court did not find that the warrants were facially invalid; it found that "Grabenstein and Reeve reasonably relied on Judge Tanksley's approval, because the warrant was not so obviously invalid that they would doubt the judge's findings of probable cause and specificity." Order on Summary Judgment, at 30. The warrants were invalid for reasons other than facial invalidity: lack of probable cause, which was an error not facially obvious[9], and lack of particularity as to some items of property (because the overbreadth of the ensuing search voided application of the severability doctrine). 425 Plaintiffs' allegations that

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[8] Defendants err in calculating the ten-day period as expiring sooner than February 7, 1994. *See* Fed. R. Civ. P. 6(a).

[9] The warrant's overbroad authorization to search all persons present, rather than those listed on the warrant applications, was likely overlooked by Grabenstein and Reeves as it was by the magistrate. It is almost certainly a clerical error rather than fraud by Grabenstein and Reeves.

Grabenstein and Reeve *knew* that the warrant was invalid are disputed by defendants, and appear unfounded.[10]

IT IS HEREBY ORDERED that "425" Plaintiffs' Motion for Reconsideration is **DENIED**.

E. CITY OF SPOKANE DEFENDANTS' MOTION FOR RECONSIDERATION

Clerical Error. City of Spokane Defendants move for clarification of a clerical error occurring within the following sentence:

> The Court now finds that the search was too general, because the searching officers relied upon but on general categories of property, rather than the descriptions in the warrant.

Order on Summary Judgment, at 34. Other parties do not object to clarification.

The Court finds that this sentence contains an error, and that the error is remediable under Fed. R. Civ. P. 60(a). Therefore, **IT IS HEREBY ORDERED** that the Court **AMENDS** its Order on Summary Judgment to read at page 34, lines 13-16:

> The Court now finds that the search was too general, because the searching officers relied upon general categories of property, rather than the descriptions in the warrant.

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[10] 425 Plaintiffs have not filed testimony of Grabenstein and Reeves indicating an intent to defraud the magistrate; they have not filed an affidavit of the magistrate (who questioned Grabenstein and Reeve at length regarding the warrants) evidencing that the magistrate was defrauded.

Defendant Stanley. City of Spokane Defendants also move for clarification that *Nicolis E.* Stanley is a defendant in the "425" case, but that *John* Stanley is not a defendant in either case. They contend that the Court's finding that "Stanley *is* a defendant" is ambiguous. Other parties do not object to clarification.

The Court finds that this sentence is ambiguous and merits clarification under Fed. R. Civ, P. 60(a). The parties[11] agree, and a review of the record[12] supports, that Nicolis E. Stanley is a defendant in the "425" case, Nicolis E. Stanley is not a defendant in the "423" case, and John Stanley is not a defendant in either case. Therefore, **IT IS HEREBY ORDERED** that the Court **AMENDS** its Order on Summary Judgment to read at page 24, lines 24-27:

> *Whether Stanley is a defendant. This is a dispute as to material fact, but it is not genuine. Nicholis E. Stanley *is* a defendant in the "425" case, as all parties admit in their Joint Statements of Claims and Parties Remaining. Neither Nicholis E. Stanley nor John Stanley is a defendant in the "423" case.

Liability. City of Spokane Defendants also move that they be held not liable to 423 or 425 Plaintiffs, because the Court failed to provide all favorable inferences to them,

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[11] Joint Statement of Claims and Parties Outstanding in "423" Case, Ct. Rec. 406 in C-89-423-AAM and Ct. Rec. 598 in C-89-425-AAM; Joint Statement of Claims and Parties Outstanding in "425" Case, Ct. Rec. 404 in C-89-423-AAM and Ct. Rec. 596 in C-89-425-AAM, at 4.

[12] First Amended Complaint, Ct. Rec. 8 in C-89-423-AAM; Complaint for Violation of Civil Rights, Ct. Rec. 1 in C-89-425-AAM, at 1 and 7 (listing "Nicholas Stanley").

because the Court erroneously concluded that the individual officers improperly executed the warrants, because the Court establishes an overly burdensome standard for searching officers, and because Lavelle's videotaping was lawful.

It is true that the Court did not cite the principle that on summary judgment, the Court must view all facts and draw all reasonable inferences in the non-movant's favor.[13] However, the Court did not neglect to apply that principle. The Court's conclusion that the defendants' own descriptions of the search (e.g., describing only general categories of items) support the conclusion that this was a general search[14] was proper. The Court could not have reasonably inferred from the defendants' descriptions, in the context of their acting without reference to a 40-page warrant listing hundreds of items, that these officers performed a search seeking only specific items. The Court did not commit clear error, and reconsideration is denied on this point.

The Court also properly concluded that the individual officers improperly executed the warrants because they did not constantly reference the warrants. Defendants' possible occasional references to the warrants[15]

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[13] *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

[14] Order on Summary Judgment, at 34 n.20.

[15] City of Spokane Defendants submit affidavits of two individual officers stating that there were isolated instances of reference to items in the warrant. These affidavits do not constitute the newly discovered evidence required for reconsideration, and as newly-proffered affidavits of long-discovered evidence are viewed with some cynicism. (425

does not establish, even by reasonable inference, the constant reference required here.[16] The "extraordinary and

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Plaintiffs point out that these affidavits conflict with earlier affidavits or testimony where the same officers stated that they never read the warrant. *See* "425" Plaintiffs' Memorandum (i) In Opposition to Defendants' Motions for Reconsideration of January 21, 1994 Summary Judgment Order, and (ii) In Support of Cross-Motion for Reconsideration of Court's Establishment of a Limited Qualified Immunity for Defendants Grabenstein and Reeve, at 14-17.)

Other affidavits submitted in opposition to the motion for summary judgment as well as the video tape of search were considered at the time of hearing on summary judgment (and reviewed here); they do not establish that defendants "constantly referenced" the warrant. *See* the complete testimony excerpted in the Order on Summary Judgment at 34, n.20. For instance, Grabenstein – the case manager and only person who had read the warrant at S. 428 Thor – has stated that "Nobody indicated to me specifically what they were looking for." "425" Plaintiffs' Memorandum (i) In Opposition to Defendants' Motions for Reconsideration of January 21, 1994 Summary Judgment Order, and (ii) In Support of Cross-Motion for Reconsideration of Court's Establishment of a Limited Qualified Immunity for Defendants Grabenstein and Reeve, at 22.

[16] As 423 Plaintiffs summarize,

> In an all-day raid during which *hundreds* of items were seized, along with approximately $1.6 million in cash, the question is not whether at some phase one or two officers referred to the warrant. . . .
>
> [T]he warrants are deemed abandoned – *not* because there were no occasions where items were referenced to the warrant – but because most, or nearly *all* of the items seized from the Marks families were taken without regard for particularity . . .

"423" Plaintiffs' Memorandum in Opposition to Defendants' Motions for Reconsideration, Ct. Rec. 449 in C-89-423-AAM and Ct. Rec. 641 in C-89-425-AAM, at 2 (emphasis in original).

unique circumstances" argued by City of Spokane defendants do not mitigate the requirement of constant reference to the warrants. The Court did not commit clear error and the City of Spokane Defendants have submitted no newly-discovered evidence; reconsideration is denied on this point.

City of Spokane Defendants contend that the Court errs by deciding issues of liability on summary judgment (rather than by jury trial), which requires them to "establis[h], *with absolute certainty*, that every item seized during a search warrant must, in fact, be the very item described in the warrants." Memorandum in Support of City Defendants' Motion for Reconsideration and Clarification of Order on Summary Judgment, Ct. Rec. 428 in C-89-423-AAM and Ct. Rec. 620 in C-89-425-AAM, at 8. The Court made no findings that overbreadth of search was established by comparison of property seized to property listed in the warrant, as City of Spokane Defendants imply.[17] The Court is sensitive to City of Spokane

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[17] The Court did make two proper findings regarding specificity of property listed or seized. First, regarding specificity of the warrants,

> The Court uses an *In re Grand Jury Subpoenas*-derived test, "would a reasonable officer knowing this description and finding *an* object fitting the description believe that s/he had found *the particular* object to be seized?" The descriptions here fail the test.

Order on Summary Judgment, at 33. Second, regarding overbreadth of the search:

> The Court now finds that the search was too general, because the searching officers relied upon general

Defendants' concern that their memories have faded almost eight years after search, but presumably plaintiffs, whose burden it will be to establish their damages, suffer the same handicap. The Court did not commit clear error, and reconsideration is denied on this point.

Finally, City of Spokane Defendants contend that Lavelle merely recorded the search without participating in it, and so should not be liable to plaintiffs. City of Spokane Defendants argue that the cases cited by the Court to support the principle that videotaping constitutes a search are distinguishable, because they were intrusions into privacy areas where a reasonable officer could not have entered unlawfully, while Lavelle had court authorization to record the search. Contrary to City

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> categories of property, rather than the descriptions in the warrant.

Order on Summary Judgment, at 34. Neither of these statements evidences a "new, unduly burdensome standard." The Court carefully limited its holding regarding the necessity for reference to a warrant during search:

> The Court does *not* hold that in all searches, searchers must continually reference the search warrant. A search for few, memorable, or a general class of objects (when allowable) would permit a searcher to know the specific item(s) for which s/he searches without reference to the warrant. Here, however, the warrant listed so many items of property that constant reference to it was required to prevent a general search.

Order on Summary Judgment, at 44 n.37 (emphasis in original).

of Spokane's contention[18], "[t]he mere *recording* of the execution of a search warrant" *is* "the equivalent of unlawful video surveillance" when the search warrant is invalid[19]. The Court did not commit clear error, and reconsideration is denied on this point.

IT IS FURTHER ORDERED that City Defendants' Motion for Reconsideration and Clarification of Order on Summary Judgment is **GRANTED IN PART** (to the extent of these amendments) and **DENIED IN PART** (as to all other requested reconsideration or clarification).

F. GRABENSTEIN'S MOTION FOR RECONSIDERATION

Grabenstein moves to be granted qualified immunity from suit and dismissed from this action. He contends that the Court erred in denying him qualified immunity because he did not constantly reference the warrant as he searched. He asserts four grounds for error: 1) officers[20] *did* reference the warrant during the search; 2) clearly established law at the time of search did not require constant reference to the warrant; 3) the Court erroneously inquired whether *a* reasonable officer might have

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[18] Memorandum in Support of City Defendants' Motion for Reconsideration and Clarification of Order on Summary Judgment, at 9.

[19] As the Court noted in its Order on Summary Judgment, "[e]xceptions to the requirement of a valid warrant exist. . . . But these exceptions do not apply to the defendants . . . " Order on Summary Judgment, at 41.

[20] Grabenstein does not argue that *he* referenced the warrant during search.

constantly referenced the warrant, rather than whether *no* reasonable officer under similar circumstances could have believed that Grabenstein's conduct was lawful; and 4) it cannot be said that *no* reasonable officer could have believed that Grabenstein's conduct was lawful, because Grabenstein did not conduct any search or seizure beyond the scope of the warrant.

For the same reasons discussed above regarding City of Spokane Defendant's reconsideration motion, Grabenstein's firstpoint fails to merit reconsideration of the Order on Summary Judgment.

Regarding Grabenstein's second point, while clearly established law at the time did not explicitly require constant reference to warrants in situations such as this, clearly established law *did* require reasonableness of officers executing search warrants. Constant reference was the only reasonable course[21] for an officer executing a search of this magnitude. The Court did not commit clear error, and reconsideration is denied on this point.

Grabenstein's third point is mere sophism; the Court correctly applied the rule of reasonableness. The Court's finding that:

> a reasonable officer would not rely upon his memory of a 40-page search warrant containing hundreds of property descriptions; a reasonable officer would know that s/he had to refer to the search warrant as s/he was searching

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[21] Other than those listed in Order on Summary Judgment, at 44 n.37, which were not followed here.

Order on Summary Judgment at 43-44, is merely a less awkward rephrasing of "No reasonable officer would rely upon his memory; no reasonable officer would not refer to the search warrant." The reasonable officer referenced is not a particular individual, who might disagree with another reasonable officer, but the generic "any officer." (Similarly, "No dogs like cats; no dogs wouldn't chase cats" can be phrased more clearly as, "A dog does not like cats; a dog chases cats." The propositions are logically identical.) The Court's declination to track the precise language of the familiar rule in favor of clarity is not clear error, and reconsideration is denied on this point.

Grabenstein's fourth point also does not merit reconsideration of the Order on Summary Judgment. Even if his actions happen to coincide with actions permitted by the warrant, by not constantly referencing the warrant he was conducting an unlawful general search. As stated in the previous paragraph, his failure could not be seen as lawful by any reasonable officer.

IT IS HEREBY ORDERED that Rick Grabenstein's Motion to Reconsider Denial of Qualified Immunity is **DENIED**.

G. CONCLUSION

1. The Court **AMENDS** its Order on Summary Judgment to read at page 2, lines 7-19:

> Summary judgment of liability for constitutional violations is granted in part to each of the 425 Plaintiffs present at S. 428 Thor (Grover, Marie, Marguerite, Steven, Robert, Polly, Richard and Steve Marks; Laura, Robert, Jason, Crissie and

Sonny Zeko; Peter and Buck Marks) against each of the defendants participating in the search at S. 428 Thor (Grabenstein, Allen, Clarke, Coker, Ennis, Freeman, Grub, Keane, Krogh, Lavelle, Lindskog, Pavlischak, Poindexter, Poole, Stanley, VanLeuven and Yates). It is denied to these plaintiffs against defendants not participating in the search (Bailor, Gaunt, Harding, Johnson, Neumiller and Reeve); these liability issues remain. Liability issues remain as described *infra* as to each of these plaintiffs against each of Bailor, Harding and Poindexter; as to each of Laura and Crissie Zeko against Grub; and as to Polly, Lisa and Shirley Marks against Grabenstein, Allen, Clarke, Coker, Ennis, Freeman, Grub, Keane, Krogh, Lavelle, Lindskog, Pavlischak, Poindexter, Poole, Stanley, VanLeuven and Yates. Liability issues remain as to all individual 425 defendants to the 425 Plaintiffs not proved present at S. 428 Thor (Shirley and Lisa Marks and Larry Zeko).

Summary judgment of liability also is granted in part to each of the 423 Plaintiffs present at S. 802 Thor (James, Jane, David, Michael and Sonny Marks) against each of the defendants participating in the search at S. 802 Thor (Allen, Clarke, Ennis, Freeman, Gaunt, Grub, Lindskog, Neumiller and Reeve). It is denied to these plaintiffs against defendants not participating in the search (Grabenstein, Coker, Harding, Krogh, Pavlischak, Poole, VanLeuven, Weir and Yates); these liability issues remain. Liability issues remain as described *infra* as to each of these plaintiffs against Harding; and James Marks against Lindskog. Liability issues remain as to each of the 423 Plaintiffs present at S. 428 Thor during the search there (James, Jane, Michael,

> Sonny and David Marks) against each of the 423 defendants participating in the search of S. 428 Thor during these plaintiffs' visit to S. 428 Thor (unknown among Allen, Coker, Ennis, Freeman, Grabenstein, Krogh, Pavlischak, Poole and Yates). Summary judgment of liability also is granted in part to Jane Marks against Coker. Liability issues remain as to all individual 423 defendants to the 423 Plaintiffs not proved present at S. 802 Thor (Tommy, Marie, Linda and Tina Marks). Liability issues remain as to all individual 423 defendants participating in the search of S. 428 Thor (Allen, Coker, Ennis, Freeman, Grabenstein, Krogh, Pavlischak, Poole and Yates) to the 425 Plaintiffs not proved present at S. 428 Thor (Tommy, Marie, Linda and Tina Marks).

"423" Plaintiffs' Motion for Reconsideration or Modification of the Judgment is **GRANTED IN PART** (to the extent of this amendment) and **DENIED IN PART** (as to all other requested reconsideration or clarification).

2. "425" Plaintiffs' Motion for Reconsideration is **DENIED**.

3. The Court **AMENDS** its Order on Summary Judgment to read at page 34, lines 13-16:

> The Court now finds that the search was too general, because the searching officers relied upon general categories of property, rather than the descriptions in the warrant.

and the Court **AMENDS** its Order on Summary Judgment to read at page 24, lines 24-27:

> *Whether Stanley is a defendant. This is a dispute as to material fact, but it is not genuine.

> Nicholis E. Stanley *is* a defendant in the "425" case, as all parties admit in their Joint Statements of Claims and Parties Remaining. Neither Nicholis E. Stanley nor John Stanley is a defendant in the "423" case.

City Defendants' Motion for Reconsideration and Clarification of Order on Summary Judgment is **GRANTED IN PART** (to the extent of these amendments) and **DENIED IN PART** (as to all other requested reconsideration or clarification).

4. Rick Grabenstein's Motion to Reconsider Denial of Qualified Immunity is **DENIED**.

IT IS SO ORDERED. The Clerk is instructed to enter this Order accordingly and forward copies to counsel and the Ninth Circuit.

DATED this 7th day of ~~February~~ March, 1994.

/s/ Alan A. McDonald
ALAN A. McDONALD
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

NOS. 93-36092, 93-36093, 93-36094, 94-35250,
94-35251, 94-35252, 94-35253 AND 94-35372

GYPSY CHURCH OF THE NORTHWEST, et al.,
Plaintiffs-Appellees,

vs.

SPOKANE COUNTY, et al.,
Defendants-Appellants.

AND

JAMES SENATOR MARKS, II, et ux., et al.,
Plaintiffs-Appellees,

vs.

CITY OF SPOKANE, et al.,
Defendants-Appellants.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

APPELLANTS' CONSOLIDATED BRIEF

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* * *

4. When the conduct of each individual officer is separately considered in light of "clearly established" law and the circumstances he/she faced, qualified immunity is proper for each.

The following synopsis of each officer's involvement establishes his or her right to qualified immunity. There are no issues of material fact that preclude the grant of qualified immunity.

(a) Sheriff's Deputy Rick E. Grabenstein: Detective Grabenstein obtained the confession from White, investigated each of White's 17 burglaries, witnessed the controlled sales at both houses, drafted the affidavit of probable cause and search warrant, had them reviewed by a Deputy Prosecutor, and answered Judge Tanksley's specific questions when obtaining the search warrant.

Det. Grabenstein entered 428 S. Thor with a search warrant he was entitled to rely upon and execute according to its terms.[23]

Det. Grabenstein did not search beyond the scope of the warrant. He searched only Grover Marks, whom he knew to be personally named in the warrant. (ER 224) He personally seized only two gold rings and a watch from Grover Marks. (ER 244) Det. Grabenstein knew those items matched "multiple" descriptions in the search warrant. (ER 1494, n. 37) As to the premises, Det. Grabenstein was entitled to search anywhere stolen jewelry or silverware could be kept, which is all he did. (ER 244)

Nonetheless, the district court denied Det. Grabenstein qualified immunity because he "participated in the search of the premises [428 S. Thor] and seized property [the two rings and watch] from Grover Marks." ER 1493:20-21. The district court based its denial of qualified immunity on the fact that, upon entering the house, Det. Grabenstein gave the search warrant to Grover Marks. (ER 1493:16-19) The district court reasoned:

> [A] reasonable officer would not rely upon his memory of a 40-page search warrant containing hundreds of property descriptions; a reasonable

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[23] ER 241-42, 248-49, 1073, 1457 (confession/investigation); 249-51, 1074 (witnessed sales); 242-43, 253, 1075, 1457 (prepared warrant); 253, 1076, 1459 (Prosecutor/Judge reviewed and issued). The district court properly held that Det. Grabenstein had qualified immunity from suit for such conduct, because he reasonably relied upon the Deputy Prosecutor's review and approval and the state district court's issuance of the search warrant. ER 1485.

officer would know that s/he had to refer to the search warrant as s/he was searching.[n. 37]

> [The Court could make exception for Grabenstein's seizure of particularly memorable items, such as Queen's Lace silverware, but Grabenstein seized a watch and two rings, which are among multiple jewelry descriptions in the warrant. *Without reference to the warrant, Grabenstein could not have known that the jewelry he was seizing in fact was described in the warrant.*
>
> *The Court does not* hold that in all searches, searchers must continually reference the search warrant. A search for few, memorable, or a general class of objects (when allowable) would permit a searcher to know the specific items for which s/he searches without reference to the warrant. Here, however, *the warrant listed so many items of property that constant reference to it was required to prevent a general search.*]

By abandoning the warrant immediately upon entry, Grabenstein in effect reduced himself to the circumstances of his fellow officers, who had not seen the warrant. Because his conduct in searching and seizing without reference to the warrant was unreasonable, Grabenstein is liable for his search at 428 S. Thor despite his qualified immunity.

ER 1493:21-1494:7 (emphasis, except "not," supplied).[24]

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[24] It is undisputed that the search warrant was in the residence during the search, and was in fact referred to by several officers. ER 735-6.

The issues this court reviews de novo are: (1) what is the specific right allegedly violated; (2) whether that right was so "clearly established" as to alert a reasonable officer to its constitutional parameters; and (3) the ultimate determination of whether a reasonable officer could have believed lawful the particular conduct at issue. *Sloman v. Tadlock*, 21 F.3d 1462, 1467 (9th Cir. 1994).[25]

The district court based denial of qualified immunity to Grabenstein upon its conclusion that he had to constantly reference the warrant in order to "know" that a particular item he seized "in fact was described in the warrant." ER 1494, n. 37. The court's rationale blurs analysis of Det. Grabenstein's conduct. Grabenstein (1) searched and seized property from the person of Grover Marks; and (2) participated in the premises search of 428 S. Thor. Neither act was clearly proscribed by established law or objectively unreasonable.

(1) The search and seizure from Grover Marks.

The search warrant authorized the search of Grover Marks. Det. Grabenstein *knew* the warrant contained "multiple" men's rings and gold watches. As stated in the Affidavit *he had just prepared*, Grabenstein had information that Grover Marks had been buying just such property, and that White's purchasers had been seen wearing some of the stolen property. (ER 603-04) Grabenstein is entitled to qualified immunity for his limited search and seizure from Grover Marks.

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[25] The material facts are undisputed.

(2) Participation in the search and seizure from 428 S. Thor.

Det. Grabenstein was authorized to search *anywhere* that "jewelry or silverware" might be kept: he did *not* have to "constantly reference" the search warrant in order to know *that*.[26] Immediately upon searching in such places, Grabenstein found an *extraordinary* number of jewelry items of a type he *knew* to be included in the warrant. Detective Grabenstein was lawfully in position to observe these facts, notwithstanding that he did not have the warrant "in hand."

Upon making such discoveries, and witnessing or hearing of those by other officers around him, Grabenstein concluded that he was in a "den of thieves" and that such property may have been stolen or related to a crime. (ER 258) That conclusion was reasonable. Established law confirms that, at that point, Grabenstein could constitutionally seize *all* such similar property.[27] "Constant

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[26] The district court impliedly holds that Det. Grabenstein had to *begin* searching for an individual, *specific* piece of jewelry from among the hundreds on the warrant. There is no support for that rule. Grabenstein knew the warrant listed numerous "jewelry" items. It was not unreasonable for him to begin searching for "jewelry." *C.f. United States v. Holzman*, 871 F.2d 1496 (1989) (upholding "jewelry" as an adequate description under similar circumstances).

If he had found a few dozen jewelry items in the bedroom drawer or jewelry box, he would be required to examine them against the search warrant prior to seizure. Those were not the facts in this case.

[27] It was *well* established at the time of this search, on strikingly similar facts, that officers who lawfully enter a suspected fence operation, and therein discover a "den of

reference" to the search warrant was not required because, under the plain view and "den of thieves" doctrines, Grabenstein had probable cause to seize all items he reasonably believed may have been stolen, even if they were *not* listed in the warrant.

The "den of thieves" cases properly reflect a unique interplay between the "plain view" doctrine and the "business" of dealing in stolen property. Fungibility is a desired attribute in stolen property: serial numbers and individuality hamper resale and increase the risk of exposure. Thus, inherently, immediate individual identification is often impossible, particularly with a large fence operation such as that in this case. The law *recognizes* this particular aspect of the crime: it does not make it a "shield" against effective investigation.[28]

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thieves," may constitutionally seize *all property they may reasonably believe to be stolen. Perlman v. City of Chicago*, 801 F.2d 262, 266-67 (7th Cir. 1986); *State v. Adam*, 37 Wn. App. 94, 100-101, 678 P.2d 1299, 1303 (1984); *Blair v. Commonwealth*, 225 Va. 483, 303 S.E.2d 881, 886-87 (1983); *State v. Legas*, 20 Wn.App. 535, 542, 581 P.2d 172, 176 (1978); *State v. James*, 91 N.M. 690, 579 P.2d 1257, 1264 (1978). *See also Crowder v. Sinyard*, 884 F.2d 804, 821 (5th Cir. 1989); *Sanford v. State*, 87 Md.App. 23, 38, 589 A.2d 74, 80-81 (1991); *United States v. Sawyer*, 799 F.2d 1494, 1508-09 (11th Cir. 1986), *cert. denied, Leavitt v. United States*, 479 U.S. 1069 (1987) (same). The district court did not discuss these cases because of its erroneous conclusion that Det. Grabenstein was not lawfully in position to perceive the evidence.

[28] The district court's standard would require the officers to have individually examined each of the several hundred items of jewelry and silverware secreted about the house, *piece by piece*, in order to ensure that each item "in fact was described in the warrant." That practice would have greatly *increased* the imposition of the search. More importantly, it would have

Det. Grabenstein's conduct in searching the premises fell well within the parameters of established law regarding searches and seizures in a "den of thieves." At no time did Det. Grabenstein's search exceed the scope of the warrant. Upon making that search, it was immediately apparent that 428 S. Thor was a den of thieves in which *all* of the jewelry might have been stolen or evidence of the crime he was investigating. Grabenstein did not need to "constantly reference" the warrant in order to reasonably draw and lawfully act upon that conclusion.[29]

Even assuming *arguendo* that Det. Grabenstein did not actually have such probable cause, it cannot be said that his conduct violated clearly established law or was objectively unreasonable. The district court's denial of qualified immunity was error. This Court should remand

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resulted in the officers missing numerous items which *were in fact stolen* and later identified by innocent victims of plaintiffs' criminal enterprise, simply because there was no immediate way to determine whether *a* particular "gold watch" was one of *the* "gold watches" listed in the warrant. In effect, the district court's standard would allow one to prevent a constitutional search and seizure by simple intermingling roughly generic items, e.g., "gold chains," so that no amount of information would permit an officer to "know[] that the jewelry he was seizing *in fact* was described in the warrant."

[29] The district court erroneously reasoned that "probable cause did not exist to seize all jewelry, etc.," because "Sonny and Grover Marks allegedly bought *many* pieces of stolen jewelry, not *all* stolen jewelry to be found in Spokane." January 21, 1994 Order on Summary Judgment, ER 1482, n. 32. That reasoning is simply nonsensical. Whether the Markses bought "all" of the stolen property to be found in Spokane has nothing to do with whether "all" of the jewelry found in their houses "may" have been stolen.

with instructions to dismiss the claims against Det. Grabenstein, with prejudice.

(b) Det. Jack Neumiller: Mr. Neumiller was a detective assigned to the Burglary Task Force in June 1986. Sheriff Det. Grabenstein had approached Det. Neumiller and other City officers with the information that a burglar had confessed to over 17 residential burglaries and admitted selling virtually all of the property stolen in those burglaries to the people at the two S. Thor addresses. Det. Neumiller was assigned to be a case manager, along with Det. Grabenstein, for the investigation.

When Det. Neumiller and his partners determined that the investigation was compromised on June 18, 1986 he immediately contacted his superiors. He and his supervisors agreed that search warrants should immediately be sought for those locations.

Det. Neumiller worked with Dets. Grabenstein and Reeve to prepare the search warrants. Det. Neumiller gathered all the reports of burglaries involving Mr. White; he reviewed them with Dets. Reeve and Grabenstein to establish the probable cause for the search warrants. Det. Neumiller left during the preparation of the warrants to assist with the noon-hour briefing of the officers. From there he went to the 802 S. Thor address where James Marks voluntarily let him in the house to search. Det. Neumiller and other officers entered the house but told James Marks they would not search until the warrants arrived. James Marks signed a waiver of constitutional rights card for the search of his house; no searching occurred, however, until Det. Reeve brought the search warrant at approximately 3:30 p.m.

As the case manager at 802 S. Thor, Det. Neumiller helped identify the items to be seized. Det. Reeve sat at the kitchen table during the search and inventoried the items. James Marks' attorney, McGoldrick, came to the house during the search and Det. Neumiller showed the warrant to him and discussed the search with him.

After the search was completed the seized items were taken to the police station. Dets. Neumiller and Reeve then double-checked their inventory list with the items placed in the property room. Det. Neumiller then assisted in the counting of the money found at 428 S. Thor. No money was found at the S. 802 address. ER 263-298; 1295-1313; 1384-1393; 731.

Det. Neumiller is a defendant in both cases. He was not at the 428 S. Thor address at any time during the search of that address, and should therefore be dismissed outright from the "425" case. The district court erred when it denied Det. Neumiller's motion for qualified immunity. *See* discussion of *Perlman v. Chicago, supra* and *Crowder v. Sinyard, supra,* pages 39-42. *See also* discussion of Sheriff's Detective Rick Grabenstein, *supra,* at pages 49-53.

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

GYPSY CHURCH OF THE NORTHWEST, et al., Plaintiffs, vs. SPOKANE COUNTY, et al., Defendants.	NO. C-89-425-RJM C-89-423-RJM AFFIDAVIT OF JACK NEUMILLER (Filed April ___, 1990)

STATE OF WASHINGTON :
: ss.
County of Spokane :

Jack Neumiller, being first duly sworn upon oath deposes and says:

I am one of the defendants in this suit, I state the following based upon my personal knowledge.

I am a police officer for the City of Spokane. I currently hold the rank of Detective and am currently assigned to the Special Investigations Unit.

I was hired by the City as a police officer on October 1, 1965. I have attended numerous law enforcement training

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point we believed that our operation had probably been discovered. We were in a car located near that South 802 Thor Address, and discussed the possibility of perhaps attempting a sale at the South 428 Thor address. However, we decided it would not be prudent to attempt the second sale that day because we were concerned about the agent's safety. We decided not to pursue any further transactions in this investigation; it became obvious that, instead, we should seek to terminate this phase of the investigation and obtain a search warrant in an effect to recover evidence.

We went to the public safety building and informed Lt. Larry Freeman, the commander of the Task Force, about the situation and discussed the best method for handling the situation. Officers were dispatched to the two houses to maintain surveillance. Det. Grabenstein, Det. Sheldon Reeve, and I began the initial preparation for requesting a search warrant. Lt. Freeman and Capt. Robert Allen, who was in charge of the Investigative Division, assigned additional personnel to put together a plan of operation and to execute the search warrants once they were obtained.

My assistance in the preparation of the warrant was limited to gathering various reports about the prior activities and burglaries and reviewing the basic facts for establishing probable cause with Det. Grabenstein and Det. Reeve. They then undertook the task of physically

preparing the affidavit of probable cause and the warrant itself. They brought it to Spokane County Deputy Prosecuting Attorney Patricia Thompson for review, and then to Judge Tanksley for judicial review and authorization.

A meeting was called in the Training Room in the Public Safety Building to brief the people who had been recruited to assist in the execution of the warrants. This meeting took place some time between noon and 1:00 p.m. I attended, along with Lt. Freeman, Capt. Allen, and Det. Pavlischak. The basic background of the investigation was explained to those who attended and we described the basic kinds of property we would be searching for, i.e., items stolen from residential burglaries. The basic tactical operations were explained by Det. Pavlischak. The officers were instructed to meet at a staging area near 4th and Freya.

Shortly before 2:00 p.m. we received reports from the surveillance teams that people had left each of the houses, and there was concern that evidence was leaving the premises. Lt. VanLeuven contacted Deputy Prosecuting Attorney Patricia Thompson to determine what alternatives we had. Lt. VanLeuven then met with Det. Pavlischak, and they decided that we should secure the two houses until the warrants arrived.

I was assigned as case manager at the South 802 Thor address. Accordingly, I went to that location and arrived at about the same time James Marks and several other officers arrived. James Marks invited us into his house. I explained to him that the police were in the process of obtaining a search warrant for his house to look for stolen property. I advised Mr. Marks of his Constitutional Rights

at 2:52 p.m. Mr. Marks signed the "Rights card, and indicated that he

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